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No. 11227 N. 8439

United States Circuit Court of Appeals

For the Ninth Circuit.

MECHANICAL FARM EQUIPMENT DISTRIBUTORS, INC., a Corporation,
Appellant,

vs.

CHESTER BOWLES, Administrator, Office of Price Administration,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

FILED
FEB 2 3 1946
PAUL P. O'BRIEN,
CLERK

Rotary Colorprint, 661 Howard Street, San Francisco

No. 11227

United States
Circuit Court of Appeals
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

HOWE & FINCH,

261 Hamilton Avenue,

Palo Alto, California.

Attorneys for Appellant.

W. H. BRUNNER,

RALPH GOLUB,

HERBERT H. BENT,

1355 Market Street,

San Francisco, California.

Attorneys for Appellee.

In the District Court of the United States
Northern District of California
Southern Division

No. 23549 R

CHESTER BOWLES, Administrator, Office of Price Administration,

Plaintiff,

vs.

MECHANICAL FARM EQUIPMENT DISTRIBUTORS, INC., a corporation, 1702 South First Street, San Jose, California,

Defendant.

AMENDED COMPLAINT FOR INJUNCTION AND TREBLE DAMAGES

Count One

1. In the judgment of the Price Administrator, the defendant engaged in actions and practices which constituted a violation of Section 4(a) of the Emergency Price Control Act of 1942 (Pub. Law 421, 77th Cong. 2d Sess., c. 26, 56 Stat. 23), as amended, hereinafter called "the Act", in that defendant violated Maximum Price Regulation No. 133 and Maximum Price Regulation No. 136, both as amended and revised, effective in accordance with the provisions of the Act, establishing under Maximum Price Regulation No. 133 maximum prices for the sale of farm equipment at retail, and under Maximum Price Regulation No. 136 maximum

prices for the sale of machines and [1*] parts and machinery services.

2. Jurisdiction of this action is conferred upon this Court by Sections 205(c) and 205(e) of the Act.

3. From and including the 11th day of May, 1942, there has been in effect, pursuant to the Act, Maximum Price Regulation No. 133, as amended and revised, establishing maximum prices for the sale of farm equipment at retail; from and including July 22, 1942, there has been in effect, pursuant to the Act, Maximum Price Regulation No. 136, as amended and revised, establishing maximum prices for the sale of machines and parts and machinery services.

4. Subsequent to the 1st day of August, 1943, the defendant, doing business in the City of San Jose, County of Santa Clara, State of California, sold, offered to sell, and continues to sell and offer for sale, farm tractors, both wheel and crawler types, at prices in excess of the maximum prices permitted by said Maximum Price Regulation No. 133 and Maximum Price Regulation No. 136, both as amended and revised.

Count Two

1. The allegations set forth in Paragraphs 1, 2, 3 and 4 of Count One herein are incorporated by reference as if fully set forth.

2. None of the said purchases was made for use

*Page numbering appearing at foot of page of original certified Transcript of Record

or consumption other than in the course of trade or business; the defendant has demanded and received a price or consideration for wheel type tractors and crawler type tractors sold by it in excess of the maximum prices established therefor under Maximum Price Regulation No. 133 and Maximum Price Regulation No. 136, both as amended and revised.

3. Three times the aggregate amount by which the prices received by the defendant in the transactions referred to in Paragraph 4 of Count One and as incorporated in Paragraph 1 of this Count and as referred to in Paragraph 2 of this Count, [2] exceeds the maximum prices provided by Maximum Price Regulation No. 133 and Maximum Price Regulation No. 136, both as amended and revised, equals Seventeen Thousand, Six Hundred and Fifty-Six and 11/100 Dollars ($17,656.11).

Wherefore, the Price Administrator demands:

1. A final injunction enjoining defendant, its agents, employees, servants and attorneys, and all persons in active concert or participation with them, from:

Directly or indirectly selling, delivering, or offering for sale or delivery, any wheel type tractor or crawler type tractor at prices in excess of those established by Maximum Price Regulation No. 133 or Maximum Price Regulation No. 136, both as amended or revised, or otherwise violating or attempting or agreeing to do anything in violation

of said Regulations, or in violation of any regulation or order adopted pursuant to the Emergency Price Control Act of 1942, as amended or revised, establishing maximum prices for wheel type tractors or crawler type tractors.

2. Judgment on behalf of the United States of America against the defendant in the sum of Seventeen Thousand Six Hundred Fifty-Six and 11/100 Dollars ($17,656.11).

3. Such other, further and different relief as to the Court may seem just and proper in the premises.

(Signed) THOMAS C. RYAN.

(Signed) GEO. A. FARADAY.

(Acknowledgment of Receipt of Service.)

[Endorsed]: Filed Oct. 5, 1944. [3]

[Title of Court and Cause.]

DEFENDANT'S INTERROGATORIES TO PLAINTIFF AND ANSWER TO INTERROGATORIES

Pursuant to Rule 33 of the Rules of Civil Procedure, defendant hereby serves upon plaintiff interrogatories to be answered by plaintiff in accordance with said rule as follows:

Interrogatory No. 1. State the name of each person to whom it is alleged in the Amended Complaint sales of tractors were made by defendant in excess

of the maximum prices permitted and, as to each such sale state also the following:

(a) The date on which such sale was made;

(b) The make, model and type of tractor sold;

(c) The maximum price which it is contended was established with respect to defendant as to such sale;

(d) The amount by which the price charged by defendant exceeded the established maximum price.

Answer to Interrogatory No. 1. Exhibit "A" hereto attached and made a part hereof, sets forth with respect to each sale of a tractor alleged in the amended complaint to have been made at a price in excess of the established maximum price: the name of the purchaser; the date of the sale; the make, model and type of tractor; the established maximum price; the amount by which the sale price exceeded the established maximum price. [4]

Interrogatory No. 2. State names of plaintiff's witnesses to be produced on trial of this case.

Answer to Interrogatory No. 2. On the trial of this case plaintiff will produce as witnesses, Rodman Bingham, Harry Oltmans and Douglas Forsyth, all of whom are employed as investigators by the Office of Price Administration.

(Affidavit of mailing attached to Defendant's Interrogatories.)

(Verification and Receipt of Service attached to Answer to Interrogatories.)

Defendant's Interrogatories Filed Oct. 16, 1944.

Answer to Interrogatories Filed Dec. 12, 1944.

(Here Follows Exhibit "A" Attached to Answer to Interrogatories.) [5]

[Title of Court and Cause.]

AMENDED ANSWER TO AMENDED COMPLAINT

Defendant answers the Amended Complaint as follows:

ANSWERING COUNT ONE THEREOF

I.

Admits the allegations of paragraphs 2 and 3 thereof.

II.

Denies each and all of the allegations contained in paragraphs 1 and 4 thereof.

ANSWERING COUNT TWO THEREOF

I.

Answering paragraph 1 thereof, defendant refers to, incorporates herein and makes a part hereof its admissions and denials contained in paragraphs 1 and 2 of its answer to count one of the amended complaint.

II.

Denies each and all of the allegations of paragraph 2 thereof.

III.

Denies each and every allegation contained in paragraph 3 thereof.

FIRST SEPARATE DEFENSE

I.

Defendant is, and since 1941 has been, engaged in the business of selling and servicing new and used farm equipment with substantial investment in buildings, shops and equipment to conduct said business and subject to substantial sums of indebtedness thereon.

II.

In its business operations defendant has been subject to numerous regulations governing its prices for sales and services as well as other war regulations affecting the conduct of its business. Said price regulations purport to fix a large [6] number of prices according to complicated and changing formulae, the meaning of which is obscure, and have been frequently changed and amended.

III.

Said regulations and amendments have made material changes in the business methods followed by defendant prior to their adoption. To the best of its ability defendant has endeavored to comply with said regulations but, by reason of lack of knowledge or misunderstanding of the provisions thereof and changes therein, mistakes resulting in violations of said regulations may have occurred. None of such mistakes and overcharges resulting

therefrom, if any, were wilful on the part of defendant and, to the best of its ability, defendant took all practicable precautions within its ability against the occurrence of such violations. Defendant has now corrected and such erroneous practices and is diligently complying with said regulations to the best of its ability.

SECOND SEPARATE DEFENSE

I.

Defendant is informed and believes and on such information and belief alleges that the amounts of overcharge alleged in plaintiff's complaint are based upon the difference between the maximum price prescribed in said regulations for used unguaranteed tractors and used reconditioned and guaranteed tractors.

II.

As amended, said regulations require that to be considered as reconditioned and guaranteed the seller must furnish the purchaser with a guarantee in writing. As originally promulgated the guarantee was not required to be in writing.

III.

Prior to the issuance of said regulations the defendant sold used tractors on the basis of informal oral guarantees and without intent to violate said regulations continued to so do. [7]

IV.

Each and every tractor sold by the defendant as

and for the price of a reconditioned and guaranteed tractor was in fact reconditioned by defendant at substantial cost and was accompanied by a binding oral guarantee for the period specified in the regulations. Any violation which occurred by reason of the failure to make such guarantee in writing did not affect the status of the tractors as actually reconditioned and bindingly, though orally guaranteed.

THIRD SEPARATE DEFENSE

I.

The sales of crawler tractors made by defendant to farmers were sales at retail and not subject to Maximum Price Regulation 136.

FOURTH SEPARATE DEFENSE

I.

Any violations of said regulations which may have occurred in the past have been corrected. Equity does not require the issuance of an injunction to prohibit acts which are not likely to occur in the future.

Defendant therefore prays judgment that plaintiff take nothing by reason of said Amended Complaint.

HOWE & FINCH
By NATHAN C. FINCH
Attorneys for Defendant.

(Affidavit of Mailing.)

[Endorsed]: Filed Nov. 2, 1944. [8]

[Title of Court and Cause.]

STIPULATION

It is stipulated by and between the parties as follows:

1. That in the period between August 1, 1943 and September 25, 1943, C. G. Hayes, A. Antichi, E. J. Grecian, Charles J. Freitas, C. C. Batten, T. J. Badami, H. S. Brinkerhoff, Carl E. Priest, Louis Montes, John Fong, Thos. D. Teresi, I. G. Buyak and H. R. Van Horn purchased tractors from defendant above named.

2. That, with the exception of H. R. Van Horn, each of the above named purchasers was a farmer at the times of their respective purchases and that they purchased said tractors from defendant and defendant sold said tractors to said farmers for the purpose of using said tractors on the farmers or orchards of said purchasers in the cultivation of the soil and in general farming and agricultural uses incident to the raising of agricultural crops by the purchasers.

3. That the tractor sold to H. R. Van Horn was purchased and sold for use by the purchaser in lumbering operations in the Santa Cruz Mountains of California.

4. That none of said purchasers herein named was in the business of selling tractors and that each of said purchasers purchased their respective tractors from defendant for use by the purchaser as aforesaid.

5. That the several sales of tractors set forth in pages 1 to 9, inclusive, of Exhibit "A" attached to plaintiff's Answer to Interrogatories filed in the above-entitled action were made by defendant at the prices therein set forth and involved the several overcharges totalling $198.60, therein set forth.

6. That none of the purchases or sales mentioned in plaintiff's Amended Complaint and more particularly set forth [9] in Plaintiff's Answer to Interrogatories filed in the above-entitled action, was made for use and consumption other than in the course of trade or business.

Dated: February 27, 1945.

W. H. BRUNNER
RALPH GOLUB
RALPH W. MORTENSON
Attorneys for Plaintiff
HOWE & FINCH
By NATHAN C. FINCH
Attorneys for Defendant

[Endorsed]: Filed March 3, 1945. [10]

[Title of Court and Cause.]

MOTION TO DISMISS

Defendant moves the Court:

For an order dismissing the action because the evidence as stipulated herein fails to show a claim against defendant upon which relief can be granted plaintiff.

The particulars wherein said evidence fails to state a claim are as follows:

The two regulations involved herein are Maximum Price Regulation 133 and Maximum Price Regulation No. 136. The stipulation of the parties shows that defendant sold tractors and other farm equipment to farmers for the purpose of using the same on the farms or orchards of the purchasers in the cultivation of the soil and in general farming and agricultural uses incident to the raising of agricultural crops by the purchasers, except the sale to H. R. Van Horn which was a sale for use in lumbering operations and that none of the purchases were made for resale or for use other than as aforesaid.

It is defendant's position that under such facts only the respective purchasers and not the plaintiff, administrator, are entitled to bring an action under the Act and that the plaintiff has no right to sue herein.

(Here Follows Memorandum in Support of Motion to Dismiss.)

Respectfully submitted,

HOWE & FINCH

By NATHAN C. FINCH
Attorneys for Defendant.

Dated: April 12, 1945.

[Endorsed]: Filed April 12, 1945. [11]

In the Southern Division of the United States District Court for the Northern District of California.

No. 23549-G

CHESTER BOWLES, Administrator, Office of Price Administration,

Plaintiff,

vs.

MECHANICAL FARM EQUIPMENT DISTRIBUTORS, INC.,

Defendant.

ORDER FOR JUDGMENT

I have concluded that M.P.R. 136 applies to the items, as to which defendant claims it is inapplicable. The evidence satisfies me that recovery should be limited to the actual overcharges. Therefore judgment will go for plaintiff in the sum of $4469.20 as per the schedule attached hereto and for a permanent injunction as prayed.

Prepare findings pursuant to the rules.

Dated: Juy 10, 1945.

LOUIS E. GOODMAN,
United States District Judge.

Schedule of Overcharges

(4)	Antichi sale	$ 78.75
(5)	Van Horn sale	229.75
(10)	Grecian sale	315.00

(11)	Freitas sale	905.00
(12)	Batten sale	306.40
(13)	Badami sale	440.25
(16)	Priest sale	717.25
(18)	Fong sale	103.75
(19)	Teresi sale	1045.21
(20)	Buyak sale	128.75
	Miscellaneous sales	198.68
		$4469.29

[Endorsed]: Filed July 11, 1945. [13]

[Title of Court and Cause.]

JUDGMENT

The above-entitled cause of action came on regularly for trial on the Fourteenth Day of June, 1945, before the Honorable Louis E. Goodman, Judge of the United States District Court, without a jury, plaintiff being represented by Ralph Golub, Esquire, and defendant being represented by Nathan C. Finch, Esquire; said trial was had on the pleadings of the parties duly made and filed herein, to wit: Complaint of the plaintiff and answer of the defendant, and the Court having heard the testimony and having examined the evidence offered by the respective parties, and the cause having been submitted to the Court for decision, and the Court being duly advised in the premises therefor,

It Is Ordered, Adjudged and Decreed that:

1. The defendant herein, its officers, agents, em-

ployees, and attorneys, and all persons in active concert or participation with the defendant, are enjoined from directly or indirectly selling, delivering, or offering for sale or delivery machines and parts at prices in excess of those established by Maximum Price Regulation 136, as amended and revised, and farm machinery and equipment at prices in excess of those established by Maximum Price Regulation 133, as amended, or otherwise violating or attempting or agreeing to do anything in violation of said Regulations.

2. Defendant pay to plaintiff on behalf of the United States the sum of $4,469.29.

Dated: August 23rd, 1945.

LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed Aug. 23, 1945. [14]

[Title of Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause of action came on regularly for trial on the Fourteenth Day of June, 1945, before the Honorable Louis E. Goodman, Judge of the United States District Court, without a jury, plaintiff being represented by Ralph Golub, Esquire, and defendant being represented by Nathan C. Finch, Esquire. Said trial was had

on the pleadings of the party duly made and filed herein to wit: Complaint of the plaintiff and answer of the defendant, and the Court having heard the testimony and having examined the evidence offered by the respective parties, and the cause having been submitted to the Court for decision, and the Court being duly advised in the premises, the Court hereby finds as follows:

1. Jurisdiction of this action is conferred upon this Court by Sections 205 (c) and 205 (e) of the Emergency Price Control Act of 1942, as amended, hereinafter called the "Act."

2. At all times hereafter mentioned, there has been in full force and effect Maximum Price Regulation 133 (7 F. R. 3185), as amended, issued pursuant to Section 2 of the Act, establishing maximum prices for farm equipment.

3. At all times hereafter mentioned, there has been in full force and effect Maximum Price Regulation 136 (8 F. R. 16132), as amended, issued pursuant to Section 2 of the Act, establishing maximum prices for machinery and transportation equipment.

4. At all times hereafter mentioned, defendant has been and now is engaged in business in the City of San Jose, County of Santa Clara, State of California, as a dealer selling and offering to sell farm equipment for which maximum prices are [15] and were at all times herein mentioned established by Maximum Price Regulation 133 (7 F. R. 3185), as

amended, and machines and parts and also machinery services for which maximum prices are and were at the times herein mentioned established by Maximum Price Regulation 136 (8 F. R. 16132), as amended.

5. On the Twenty-seventh Day of August, 1943, said defendant sold and delivered to A. Antichi a used caterpillar "15" tractor, Serial No. PV3387, for the sum of $1,000.00. On said date, the maximum price for which said used caterpillar "15" tractor, Serial No. PV3387, could have been legally sold under Maximum Price Regulation 136 (8 F. R. 16132), as amended, was the sum of $921.25.

6. On the Twentieth Day of August, 1943, said defendant sold and delivered to H. R. Van Horn a used caterpillar "RD4" tractor, Serial No. 4G204, for the sum of $2,750.00. On said date, the maximum price for which said used caterpillar "RD4" tractor, Serial No. 4G204, could have been legally sold under Maximum Price Regulation 136 (8 F. R. 16132), as amended, was the sum of $2,520.25.

7. On the Fourth Day of September, 1943, said defendant sold and delivered to E. C. Grecian a used Cletrac "20G" tractor, Serial No. 13802, for the sum of $1,250.00. On said date, the maximum price for which said used Cletrac "20G" tractor, Serial No. 13802, could have been legally sold under Maximum Price Regulation 136 (8 F. R. 16132), as amended, was the sum of $935.00.

8. On the Eleventh Day of September, 1943, said

defendant sold and delivered to Charles J. Freitas a used Cletrac "AD2" tractor, Serial No. 4N26, for the sum of $2,115.00. On said date, the maximum price for which said used Cletrac "AD2" tractor, Serial No. 4N26, could have been legally sold under Maximum Price Regulation 136 (8 F. R. 16132), as amended, was the sum of $1,210.00.

9. On the Twenty-third Day of September, 1943, said defendant sold and delivered to C. C. Batten, a used Oliver Standard "60" tractor, Serial No. 410353, for the sum of $1,000.00. On [16] said date, the maximum price for which said used Oliver Standard "60" tractor, Serial No. 410353, could have been legally sold under Maximum Price Regulation 133 (7 F. R. 3185), as amended, was the sum of $693.60.

10. On the Thirteenth Day of November, 1943, said defendant sold and delivered to T. J. Badame a used Cletrac "AG" tractor, Serial No. 19450, for the sum of $1,400.00. On said date, the maximum price for which said used Cletrac "AG" tractor, Serial No. 19450, could have been legally sold under Maximum Price Regulation 136 (8 F. R. 16132), as amended, was the sum of $959.75.

11. On the Eighth Day of October, 1943, said defendant sold and delivered to Carl E. Priest a used caterpillar "25" tractor, Serial No. 3C268, for the sum of $1,650.00. On said date, the maximum price for which said used caterpillar "25" tractor,

Serial No. 3C268, could have been legally sold under Maximum Price Regulation 136 (8 F. R. 16132), as amended, was the sum of $932.25.

12. On the Twenty-first Day of October, 1943, said defendant sold and delivered to John Fong a used caterpillar "15" tractor, Serial No. PV7032, for the sum of $1,025.00. On said date, the maximum price for which said used caterpillar "15" tractor, Serial No. PV7032, could have been legally sold under Maximum Price Regulation 136 (8 F. R. 16132), as amended, was the sum of $921.25.

13. On the Twenty-third Day of October, 1943, said defendant sold and delivered to Thomas D. Teresi a used caterpillar "50" tractor, Serial No. IE382, for the sum of $3,500.00. On said date, the maximum price for which said used caterpillar "50" tractor, Serial No. IE382, could have been legally sold under Maximum Price Regulation 136 (8 F. R. 16132), as amended, was the sum of $2,454.79.

14. On the Twenty-fifth Day of October, 1943, said defendant sold and delivered to I. G. Buyak a used caterpillar "15" [17] tractor, Serial No. PV-4974, for the sum of $1,050.00. On said date, the maximum price for which said used caterpillar "15" tractor, Serial No. PV4974, could have been legally sold under Maximum Price Regulation 136 (8 F. R. 16132), as amended, was the sum of $921.25.

15. Each of the aforesaid purchasers with the exception of H. R. Van Horn was a farmer at the

times of their respective purchases, and they purchased said tractors from defendant and defendant sold said tractors to said farmers for the purpose of using said tractors on the farms or orchards of said purchasers in the cultivation of the soil and in general farming and agricultural uses incident to the raising of agricultural crops by the purchasers. The tractor sold to H. R. Van Horn was purchased and sold for use by the purchaser in lumbering operations.

16. None of the aforesaid purchases was made for use or consumption other than in the course of trade or business.

17. Defendant's violations were neither wilful nor the result of failure to take practicable precautions against the occurrence of violations and hence the damages allowed will be the amount of the overcharges.

CONCLUSIONS OF LAW

As conclusions of law from the foregoing facts, the Court finds:

1. Maximum Price Regulation 136, as amended, applies to the items as to which plaintiff claims it is applicable.

2. Plaintiff is entitled to a permanent and final injunction enjoining the defendant, its officers, agents, employees, and attorneys, and all persons in active concert or participation with the defendant, from directly or indirectly selling, delivering,

or offering for sale or delivery machines and parts at prices in excess of those established by Maximum Price Regulation 136, as amended and revised, and farm machinery and equipment at prices in excess of those established by Maximum Price Regulation [18] 133, as amended, or otherwise violating or attempting or agreeing to do anything in violation of said Regulations.

3. Plaintiff is entitled to judgment against the defendant in accordance with Count Two of the Complaint, for damages pursuant to Section 205 (e) of the Emergency Price Control Act of 1942, as amended, by reason of the transactions set forth in paragraphs 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14 of the Findings of Fact in the sum of $4,469.29.

Let judgment be entered accordingly.

Dated this 23rd day of August 1945.

LOUIS E. GOODMAN,
United States District Judge.

(Acknowledgement of Service.)

[Endorsed]: Filed Aug. 23, 1945. [19]

[Title of Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS

Notice is hereby given that Mechanical Farm Equipment Distributors, Inc., a California Corporation, the defendant above named, hereby appeals

to the Circuit Court of Appeals of the United States for the Ninth Circuit from the final judgment and the whole thereof which was entered in this action on the 23rd day of August, 1945, in favor of plaintiff and against defendant.

Dated: October 17th, 1945.

HOWE & FINCH.
By NATHAN C. FINCH,
Attorneys for Defendant.

[Endorsed]: Filed Oct. 19, 1945. [20]

[Title of Court and Cause.]

TESTIMONY OF VERNA M. SMITH,

a witness called on behalf of the Plaintiff (Pages 25 to 49, line 22):

VERNA M. SMITH,

called by the Government; sworn.

The Clerk: Q. Please state your name to the Court.

A. Verna M. Smith.

Direct Examination

Mr. Golub: Q. Is that Miss or Mrs.?

A. Mrs.

Q. Mrs. Smith, are you the secretary of the Mechanical Farm Equipment Association?

A. I am.

(Testimony of Verna M. Smith.)

Mr. Golub: Your Honor, we are calling the defendant under Federal Rule 43 (b).

Q. Mrs. Smith, you are under subpoena?

A. Yes.

Q. You appeared here by subpoena?

A. Yes.

Q. You were requested by that subpoena to produce certain records? A. Yes.

Q. You have records showing the basis upon which maximum prices were determined at the time the products in question were sold, those sales that were covered by Maximum Price Regulation 136?

A. We have the price lists that we kept in our files on our tractors.

Q. Yes, but do you have with you the records showing the basis upon which those maximum prices were arrived at, records showing what you have taken as the nearest equivalent, for example?

A. There were no records made at the time. We never compared them with competitive models. We used our own models, what they were the nearest to, or to Caterpillar, whose models, horse power for horse power, were nearest to ours, right down the line.

Q. Are you familiar——

A. I am familiar with the different model tractors.

Q. Are you familiar with the provisions of Maximum Price Regulation 136?

A. We have to keep a record of the tractor, the cost and the things to do to it. [21]

(Testimony of Verna M. Smith.)

Q. Yes.

A. We have a perpetual inventory.

Q. Do you have a record showing how you arrived at the maximum price? In other words, do you state upon your record what the nearest equivalent machine is?

A. We did not then, no; the records we brought were the ones made at that time.

Q. During the period covered by our investigation, that is, during the periods of violations——

A. There has been nothing added to them. They are just like they were when we made them then.

Q. At that time did you keep those records?

A. Yes.

Q. The records showing the way these prices were arrived at? A. Yes.

Q. Do those records have the nearest equivalent machine on them? A. Not marked on them.

Q. Have you that?

A. The attorney has a sheet for each one of the cases.

Mr. Finch: What ones do you want?

Mr. Golub: I would like the record showing how the maximum prices for all the eleven items on which we claim overcharged were arrived at.

The Witness: Prices were checked thoroughly.

Mr. Finch: There aren't any records showing the method. Do you mean the comparison to the nearest equivalent?

Mr. Golub: The regulation says, "you are required to keep records showing as precisely as pos-

(Testimony of Verna M. Smith.)

sible the basis upon which maximum prices for machines and parts were sold." Now, those records would, if kept, indicate how you arrived at the maximum price for the machines. That provision was in effect at the time of these violations, your Honor, and those records would show the machine sold, the serial number, the model number, the nearest equivalent, whether it was sold as reconditioned and guaranteed.

The Court: I understand that, but I understood Counsel to say there was no such record.

Mr. Finch: We do not have a record showing a comparison with the nearest equivalent. We have here for each sale a card inventory record showing its cost. [22]

The Court: Suppose you produce in answer to the subpoena whatever record you have which you think answers the call of the subpoena.

Mr. Finch: Mine are in order. As a matter of fact, I was going to put them in. I can put them in right now.

Mr. Golub: What I am trying to find out, your Honor, is how the Mechanical Farm Equipment Company arrived at their maximum prices.

The Court: Why don't you produce one, examine the record, and you can quiz the witness from that and bring out what you want to find out.

Mr. Golub: How about Item No. 19, the sale to Teresi?

The Witness: Shall I proceed?

(Testimony of Verna M. Smith.)

Mr. Finch: I expect to put these in, your Honor.

The Court: At the moment the plaintiff wants to develop how you kept your records.

Mr. Golub: Q. I have here what purports to be card inventory record, a contract and some invoices. Could you identify those, Mrs. Smith?

A. Yes, I made those.

Q. Will you tell the Court what they are?

A. When a tractor comes in, according to our system, it is given a stock number. A different sheet is made for each piece of equipment. The cost is put here, and any work done on it is added to it as it proceeds. Then when it goes out the sheet is turned over and the record of the sale made on the other side.

Q. What do you have in that group of records regarding that one transaction, the sale to Thomas D. Teresi, which indicates how you arrived at the maximum price for the sale of that tractor?

A. There isn't anything here. All I can say is whenever we sold a competitive tractor we called the Caterpillar dealer, who is right near us there, and asked the price for that particular tractor. And we have at different times discussed with him about what is a comparable model as well. But we neither one could decide whether we should go into another line or always use the kind of tractor we were talking about. [23]

The Court: Q. So far as the record you have there is concerned, in the particular transaction

(Testimony of Verna M. Smith.)

that Counsel has referred to, that indicates only the price at which you sold the tractor?

A. And what we bought it at.

Q. The price at which you bought it. But you have no way, no data on that page you have in your hand that shows the manner in which you arrived at the selling price? A. No.

Q. Whatever selling price you arrived at you put down on that sheet and that is the extent of your record on that subject?

A. Yes. We checked them, however. Every price is checked with something.

Q. But that does not appear on the record itself? A. No.

The Court: Is that what you want to develop?

Mr. Golub: That is right, your Honor.

The Witness: That is right.

Mr. Golub: Q. Is there anything on those records that you have there, Mrs. Smith, to indicate whether or not the machine was sold as reconditioned and guaranteed?

A. This one here says "90 days guarantee" on the order line. And on the service side, where we make a record of the service—let's see, it was sold in October—pretty close to $244 free service given on it in almost 90 days.

Q. Would you mind showing me where it says that is guaranteed?

A. 90 days guarantee here (indicating), and on this service record here is given the record of the invoices where free service was given. I marked

(Testimony of Verna M. Smith.)

that "free" in there just to show that was a service record.

Q. What does this 90 day guarantee include, Mrs. Smith, do you know?

A. Well, since before the war—and we still do it the same way—we always have a standard guarantee on tractors. Anything over $500 was guaranteed for 90 days. Sometimes we guaranteed them much longer, to keep customers happy if something unusual happened. We had a standard guarantee of 90 days, which is longer than the ones prescribed by the OPA.

Q. Is this the original contract or a copy?

A. That is the original. [24]

Q. Did the purchaser get a copy of that?

A. Yes.

Q. Was this 90 days guarantee on the contract at the time the contract was entered into?

A. Yes, because he gets a carbon copy of this order when it is written.

Q. Mrs. Smith, I have what purports to be a statement indicating the records of sales of used machines and tractors as indicated by sales invoices for the period from August 1, 1943, to October 30, 1943, certified to by Verna M. Smith. I will show you this statement and ask you if you made that statement.

A. This is what Mr. Forsythe wrote up? Is that the auditor?

Q. That is correct.

A. "I hereby certify that the foregoing is a true

(Testimony of Verna M. Smith.)

and correct transcription——" yes, I certified to that. He couldn't take our original invoices and orders from the office. He did not wish to. So I certified them as they appeared in our records.

Q. Then they were true and accurate copies, correct in every detail?

A. Some of them he wrote his comments in the column that I objected to, and I told him at the time——

Q. Did you state your objection on those papers at the time you signed them?

A. He crossed out some things that—he first made the statement that I was certifying he had had made a copy of all the invoices. And I said, "Well, you have only picked out the ones that you consider violations. You haven't taken them all. There are lots of invoices."

Q. Mrs. Smith, are these correct copies of your records, the information on those sheets that you have there? They may not include all your records.

A. As near as I remember. He did the auditing. I did not. All I did was certify so he wouldn't have to take the——

The Court: Q. Madam, all the attorney wants to know is whether those papers that you have in your hand are correct copies of your records or not. A. These are original records.

The Court: No. You had better take those out of her hands.

(Testimony of Verna M. Smith.)

Mr. Golub: Q. Is that a correct copy of this record? A. This?

Q. Yes.

A. I would have to read it and see. [25]

Q. Will you read the certification to the Court?

A. "I hereby certify that the foregoing is a true and correct transcription of invoices for used machinery sold by our San Jose-Salinas office; that information concerning guarantees has been furnished the investigator as indicated in the column headed 'Comments', that I personally am familiar with these transactions; that all records are kept under my supervision and control."

I certified that the orders and the invoices were as he found them.

Q. Is that your signature on there?

A. That is my signature.

Q. Is this particular transaction noted on that statement there anywhere?

The Court: Your record is not going to be clear, Mr. Golub. You say "this particular transaction". The record does not show what you are talking about.

Mr. Golub: I am talking about the sale to Mr. Teresi on October 23, 1943.

The Witness: It says, "no guarantee" in the column, and I protested at the time. I signed it under protest, because he wrote on several of them there was no guarantee, because he said he didn't think they would consider it an adequate guaran-

(Testimony of Verna M. Smith.)

tee, because it was not in the prescribed form of OPA.

Mr. Golub: You saw that "no guarantee" on there at the time you signed it?

A. Well, he said that. There are several others. You will find the same thing, that he did not consider they would be adequate. He has written, "no guarantee" on everything except one or two places he made a concession and wrote "oral 60 days" and had me initial it over here.

Q. Is it my understanding, Mrs. Smith, you did not agree with him but you signed it anyhow?

A. I didn't agree on guarantees. I didn't stipulate what the guarantees were. I was only certifying that those were copies of our records so he wouldn't have to take them from the office. I wouldn't have any way of convincing him what [26] the guarantees were. He just wrote there was none on them and that was all.

Q. Are the invoices of this transaction in the sale of the tractor to Thomas Teresi attached to those records? Do you have the invoices there?

A. The invoice for the sale itself is not here, but it is in another bundle of invoices that I have.

Mr. Golub: (to Mr. Finch) Do you have those?

The Witness: No, the attorney hasn't got it. I can get it for you.

Mr. Finch: What do you mean by invoices?

Mr. Golub: We have asked for invoices on all machines and parts.

(Testimony of Verna M. Smith.)

The Witness: I have them if you want me to leave the stand and get them.

The Court: The witness says if she is permitted to leave the stand she can find them for you.

Mr. Golub: Q. I have here what purports to be an invoice of a sale of a used Cat. RD Tractor, Serial No. RE382 to Thomas E. Teresi, dated October 23, 1943?

A. That is exactly a copy. This sheet here is copied from it.

Mr. Finch: May I ask what you mean by an invoice, Counsel?

Mr. Golub: A statement, a sales tag, anything you want to call it.

Mr. Finch: A record?

Mr. Golub: A record of the sale in the transaction. This is an invoice, I assume.

Q. Is this the invoice you have brought pursuant to our subpoena? A. Yes, this tag, that is all.

Q. Can you identify that as the invoice in this sale? A. Yes.

Q. Does that invoice anywhere state that the tractor was sold on a reconditioned and a guaranteed basis? A. No, not on the invoice.

Mr. Golub: May I call your Honor's attention to the provisions of Section 1390.11 of Maximum Price Regulation 136, which states that in order for a machine to be sold on a reconditioned and guaranteed [27] basis four things must be proved: first, all worn and missing parts must be replaced. Two, it must be expressly invoiced as reconditioned

(Testimony of Verna M. Smith.)

and guaranteed and a binding written guarantee of 60 days satisfactory performance, and tested under power pressure. We offer this copy of the invoice of the sale to Thomas Teresi together with all the other records of the transaction as our exhibit first in order.

The Court: Very well, it will be admitted.

Mr. Finch: We have no objection, your Honor, except I asked Counsel what he means by the word "invoice." An invoice is a record. The record shows it was guaranteed. I believe it was invoiced as such.

The Court: I believe the witness testified, as appears on the back of one of the records, a substantial amount of reconditioning was done on the tractor without charge.

The Witness: There was $244 worth of free service given on it.

Mr. Golub: In addition to that, your Honor, it must be expressly invoiced as guaranteed. The actual reconditioning and guaranteeing of a machine is not sufficient to take an 85 per cent price. It must in fact state on the invoice it was reconditioned and guaranteed and the binding written guarantee must be given. In addition to that, the fact that the repairs were actually made or that they offered to make repairs or did in fact——

The Court: Of course, you may argue that later. I would be inclined to think that that might be considered too technical. If there was a word of mouth guarantee and then actual performance,

(Testimony of Verna M. Smith.)

actual doing of the work, it would be a rather technical application of that rule.

Mr. Golub: That argument was made in the case of Bowles against Barber, I think it is. That was decided in the United States District Court, Eastern Division of Michigan, February 22, 1944.

The Court: Is it reported any place?

Mr. Golub: 54 Fed. Supp. 453. That case held that even though an oral guarantee was given, even though the machine may have in fact been reconditioned and guaranteed, if the binding written guarantee [28] as required by the regulation was not given, it could not be sold on an 85 per cent basis.

The Court: Did they allow treble damages in that case?

Mr. Golub: I do not know if they allowed treble damages, your Honor, but I will say that if the machine——

The Court: I think you might be entitled to an injunction, but it would be another thing to ask for treble damages.

Mr. Golub: The fact that the machine was reconditioned and guaranteed would tend to show good faith, your Honor, but the regulation specifically prescribes the method, and there is no ambiguity in the section whatsoever.

The Court: I do not disagree with you. I am talking about the remedy. I say upon a showing that that regulation was not complied with you might be entitled to an injunction, but whether or

(Testimony of Verna M. Smith.)

not the remedy of treble damages should be awarded is another matter.

Mr. Golub: Certainly, your Honor, at least the actual over-charges should be awarded. Perhaps the fact that the machine was reconditioned and guaranteed would go to show the good faith of the dealer in selling the machine. But certainly I do not think under any circumstances, when the regulations specifically say they cannot take the 85 percent price and that their maximum price is 55 per cent, anything over that would be an overcharge.

The Court: In considering whether or not there was any actual overcharge, wouldn't you have to consider, for example, whether the amount of the reconditioning had not exceeded the percentage that is allowed? Perhaps I am not making myself very clear.

Mr. Golub: I understand your Honor's point, and although I thought of every angle of this, that is the first time I have heard of that one. I do not see how the actual service charges could be made a part of the cost. The price charged is the price at the time of the sale.

The Court: Let us say without the guarantee the man could charge $100 and with the guarantee he could charge $200, and he charged $200, [29] but did not put the fact of the guarantee on the invoice, but had a verbal understanding, and then acted on it and did, we will say, $75 worth of reconditioning work afterwards.

Mr. Golub: The price I sell it for, to begin with

(Testimony of Verna M. Smith.)
your Honor, is the 55 per cent price. The fact that eventually he may have put a lot of repairs upon that tractor and did not charge the purchaser for those repairs does not alter the fact that when that sale was made a payment was made to him for that tractor, or a contract for payment was made—in these cases payment was actually made—why, there was an overcharge according to clear wording of the regulation.

The Court: Because it was not included in the invoice, you mean?

Mr. Golub: That is correct, your Honor. In this particular case the contention is there was a 90 day guarantee given. We still do not contend that that complies with the regulation. Further, we still claim that at the time Mrs. Smith prepared that statement she certified it as having no guarantee. Now, I do not know whether that guarantee was on there at the time it was entered into or was put on at a later time. I do not know, your Honor.

The Court: I understand that point.

Mr. Golub: Q. Now, Mrs. Smith, do you have the records showing how maximum prices were established for any of the other eleven items that we have questioned today?

A. We checked the prices.

The Court: Q. He wants to know if you made in your written records——

A. No, they are all the same as this one.

Mr. Golub: Q. Do they all state a 90-day guarantee? A. No, no.

(Testimony of Verna M. Smith.)

Q. Do some of them leave out any reference to a guarantee at all?

A. Yes, on some of them there is nothing written at all.

Mr. Golub: Counsel, do you want to stipulate as to those which have nothing written on them at all, or do you want to take them out?

The Court: Why don't you try to get what you need together over the noon recess and that will probably save a little time in the matter. We will take a recess until 2 o'clock.

(An adjournment was thereupon taken until 2:00 o'clock p.m.) [30]

Afternoon Session,

June 14, 1945, 2:00 p. m.

The Clerk: Bowles vs. Mechanical Farm Equipment Distributors, Inc.

Mr. Golub: Ready, your Honor.

Mr. Finch: Ready, your Honor.

The Court: Proceed.

Mr. Golub: If your Honor please, during the noon recess I scrutinized the Graybar case. That was a summary judgment and the full treble damages were granted the administrator.

The Court: I will look at the decision.

Mr. Golub: I don't know whether or not your Honor would like to hear the official interpretation on the point of whether or not the invoice must

contain the express guarantee and whether or not in regard to repairs after sale should be added in as part of the sale price.

The Court: The regulation says it must be in the invoice. I was not intending to decide the matter, but was trying to find out what the point was in connection with this interpretation, and I was wondering if, in fact, the reconditioning work was done and whether or not that would affect the matter of the remedy rather than the violation.

Mr. Golub: We have agreed, your Honor, on certain items. We have agreed on what the base price was on those items and whether or not there was a written guarantee, and I think Mr. Finch is ready to stipulate at this time.

The Court: State what it is you will stipulate to.

Mr. Golub: In the sale to A. Antichi, it is stipulated that the base price was $1,675. That is the new base price. It is also stipulated, your Honor, there was no written guarantee given in that matter.

Mr. Finch: Each guarantee is separate. I have them listed separately. [31]

Mr. Golub: All right, which ever you like. In the sale to H. R. Van Horn, it is stipulated that the new base price is $2,850.

Mr. Finch: How much?

Mr. Golub: $2,965, pardon me.

The Court: $2,965 instead of $2,850?

Mr. Golub: That is correct. And the sale to Charles J. Freitas, a new base price——

The Court: Which number is that?

Mr. Golub: That is No. 11 on the list.

The Court: I have it, yes.

Mr. Golub: The new base price is $2,200. And the sale to T. J. Badame, it is stipulated the new base price is $1,745. That is No. 13, your Honor. In the sale to John Fong—that is No. 18 on the exhibit—the new base price is $1,675. In the sale to I. G. Buyak, it is stipulated the new base price is $1,675. In the sale to C. C. Batten—No. 12 on the exhibit—it is stipulated that the new base price in that case would be the current suggested retail price of $816.

As to the matter of whether or not a written guarantee was given we have agreed that in Item No. 4 the sale to A. Antichi, there was no written guarantee.

Mr. Finch: Let's put it this way: we will stipulate there is no question of written guarantee except on the following, because on most of them there are no written guarantees and on a minority of them, there is a guarantee line filled in, and it is up to the Court to determine whether or not it is a guarantee. I am contending it is a guarantee. Those are sales to Van Horn, Fong and Teresi.

Mr. Golub: That is Counsel's contention that there was a written guarantee and we don't agree to that.

Mr. Finch: I will stipulate there was no guarantee on those. I exclude those from the stipulation.

Mr. Golub: If we agree to that, then we must agree there was a guarantee on those other sales.

We will agree there was no [32] guarantee on the items we agreed on.

Mr. Finch: I say I would stipulate there was no written guarantee.

The Court: That is what he stated. You are in agreement on that. What are the numbers of those?

Mr. Golub: 4, 11——

Mr. Finch: Let's get them by name.

Mr. Golub: No. 4, Charles J. Freitas—no written guarantee; I. G. Buyak, No. 20, no written guarantee; G. C. Hayes, No. 3, no written guarantee; E. C. Grecian, No. 10, no written guarantee; C. C. Batten, No. 12, no written guarantee; and Carl E. Priest, No. 16, no written guarantee.

Mr. Finch: We don't mean there is no oral guarantee, just that there is no written evidence.

(The records re sale of tractor to Thomas D. Teresi were received in evidence as Plaintiff's Exhibits 1-A to 1-H.)

VERNA M. SMITH

resumes the stand as a witness on behalf of the plaintiff; and having been previously sworn, testifies as follows:

Direct Examination

Mr. Golub: Q. You have, Miss Smith, the record showing how the maximum prices were established in the sale to H. R. Van Horn?

A. I can tell you how we established it.

Q. Do you have anything with you?

(Testimony of Verna M. Smith.)

A. Just the same thing as the other one. There is a letter.

Mr. Finch: It is our contention there is a written guarantee.

A. Isn't there a copy of a letter with that? There is a letter that was written to Mr. Van Horn stating if he would bring in the starting motor on his tractor, which was the bone of contention, that we would repair it.

The Court: I don't know what we are getting into when you make these voluntary statements. Let us have the examination conducted in the usual way.

A. Yes.

Mr. Golub: Q. Miss Smith, I have here several contracts, four [33] in number, and also what purports to be an invoice setting forth the sale of a Cat. "15", P.B. 7032 Tractor—I will withdraw that last. I have all of the contracts here. I concede that. I have a contract of a sale of an RD 4 Tractor to H. R. Van Horn, dated August 17, 1943. Would you tell the Court what that represents?

A. This covers an RD 4 Tractor and a Diesel Oil Tanker.

Q. Was there a written guarantee on that?

A. It says, "Guaranteed in A-1 shape" on here.

Q. Is that the original? A. Yes.

Q. Was a copy sent to the purchaser?

A. It is supposed to be given him at the time.

Q. That is your procedure, to keep the original and give the copy to the purchaser? A. Yes.

(Testimony of Verna M. Smith.)

Q. Is there any other statement on there as to the condition of that tractor at the time it was sold other than the fact that it was in A-1 shape?

A. No.

Q. Do you have an invoice covering the sale of that tractor to Mr. Van Horn?

A. We have a sales tag like the one I gave you—will you tell me the date?

Q. It is the same date.

A. I think it is on the 20th.

The Court: Can't you reach the point you are getting at by stipulation, if it is a matter of record.

Mr. Golub: Will you stipulate, Mr. Finch, that none of the invoices have the words "written guarantee" on them?

Mr. Finch: I am not sure what you mean by an invoice.

The Court: Use Plaintiff's Exhibit No. 1.

Mr. Finch: I will stipulate none of those pieces of paper that are like this small piece which are attached to the sales, differing from the contract of sale, have any mention of guarantee on them. I don't stipulate that the contract is not an invoice, your Honor.

The Court: I am just trying to save time here. If I am stating something that is not correct, you may correct me. Will you stipulate a similar document to Plaintiff's Exhibit No. 1 was made up by the [34] defendant in each of the cases that Counsel is now going to refer to and on none of them does

(Testimony of Verna M. Smith.)

there appear to be any notation of any guarantee or reconditioning agreement.

Mr. Finch: Yes, your Honor, we will stipulate any of the references, with regard to the guarantee, that it is a contract sale only.

Mr. Golub: We won't stipulate to that, your Honor.

Mr. Finch: I am trying to preserve my position.

The Court: I am not trying to have you give up anything in your position. I am just trying to get the facts in the record. Are you willing to stipulate to what was said? Read the statement of Counsel, Mr. Reporter.

(Record read.)

The Court: That is all I want to have at the present time.

Mr. Finch: What I am getting at is that Plaintiff's Exhibit 1 seems to be these papers and I am making——

The Court: Let's mark the sheet we are referring to as Plaintiff's Exhibit 1-A?

Mr. Golub: Will it be out of order at this time to have your Honor take judicial notice of the fact that the tag appearing as Plaintiff's Exhibit 1-A is an invoice, or if you want I can take the invoices that we have subpoenaed.

The Court: Ask the witness, if there is any other invoice.

Mr. Golub: Q. Do you have any other invoices than the invoice I have here designating the name

(Testimony of Verna M. Smith.)
Thomas D. Teresi, dated October 23, 1943, Plaintiff's Exhibit 1-A?

A. No. We have no other.

Q. You have no other invoice?

A. We have no other invoice, but this is a contract of sale.

Q. What do you call this?

A. This is a sales tag.

Q. Referring to Exhibit 1-A?

The Court: You had better name the cases that are going to be covered by this stipulation. You started to read them off and you only got to one of them. [35]

Mr. Golub: This stipulation will refer to all sales. That would include the sale to A. Antichi, H. R. Van Horn, Charles J. Freitas, T. J. Badame, John Fong, I. G. Buyak, J. C. Hayes, E. C. Grecian, Carl E. Priest, C. C. Batten, and Thomas D. Teresi. We have this contract dated August 17, 1943, covering the sale of an RD 4 Tractor to H. R. Van Horn as our Exhibit next in order.

The Court: It may be admitted.

(The document in question was thereupon admitted in evidence as Plaintiff's Exhibit 2.)

Mr. Golub: Mrs. Smith, I have here what purports to be a contract of a sale of an A. G. Clectrac, Serial No. 19450 to one Badame.

I show you that contract and ask you to tell the Court what that contract is.

A. It covers an "X" Tractor.

(Testimony of Verna M. Smith.)

Q. Does that contract have on it any guarantee provision?

A. "The distributor or dealer makes to the purchaser the same and no other warranty than the following, to-wit: 2 months on faulty material."

Mr. Golub: We offer this contract in evidence as our exhibit next in order.

(The document was thereupon admitted in evidence as Plaintiff's Exhibit No. 3.)

Q. I have here a contract dated September 29, 1943, Mechanical Farm-Equipment Distributors, covering the sale of a Caterpillar 15, Serial PV 7032, to John Fong, and show you the contract, Miss Smith, and ask you to tell the Court what that contract represents.

A. This covers a tractor and other pieces of equipment.

Q. Will you tell the Court whether or not there is any provision on that contract——

A. It says on the guarante line, "Check over completely fix seat and air cleaner. Steam clean and paint."

Q. Is there any other reference to any guarantee? A. Not on here. [36]

Mr. Golub: We offer this contract in evidence as our exhibit next in order.

(The document was thereupon received in evidence as Plaintiff's Exhibit 4.)

Mr. Golub: I have no further questions to ask of this witness.

(Testimony of Verna M. Smith.)

The Court: Any cross-examination?

Mr. Finch: No, your Honor.

The Court: That is all, Madam.

Mr. Golub: That, your Honor, is our case.

(Plaintiff rests.)

TESTIMONY OF J. R. DELFINO,

a witness called on behalf of the defendant (Page 72, line 11, to Page 77, line 24.)

Mr. Finch: Q. Mr. Delfino, I have shown you Repair Order, No. 0583. You identified that as Mr. Freitas and showing repairs done on his tractor for $28 after the sale? A. After the sale.

Q. Why did you make those repairs?

A. Because we agreed to do such.

Mr. Finch: I will offer that in evidence as Defendant's exhibit next in order.

The Court: It may be admitted.

(Repair order to Charles Freitas dated November 17, 1943, was received in evidence as Defendant's Exhibit E.)

The Court: Q. You say you made an agreement, Mr. Delfino?

A. Yes.

Q. Did you have a conversation with Freitas?

A. Absolutely.

Q. What was it?

A. He asked me what shape the truck was in and I took him to show him the truck. He says,

(Testimony of J. R. Delfino.)
"What assurance have I this tractor will operate for any length of time?" And I says, "Our ordinary 90-day policy will take care of that." He says, "What is that?" I says, "In the past, 90 days is the standard [37] agreement for anything that sold over $500 since 1930, there was a 90-day satisfaction period to the purchaser."

The Court: Q. What do you mean by that?

A. We maintained and kept that tractor in good working order for the 90 days.

The Court: Q. You mean as to defective parts?

A. As to defective parts and workmanship.

Q. You say this firm has followed that policy?

A. For sales above $500 since 1930.

Q. Is that what you referred to in your conversation with Mr. Freitas? A. Yes, sir.

Q. Have you ever put that in writing in any of your transactions?

A. Only when they forced us to put it in writing, if a party says, "Your word doesn't mean anything, so will you put that in writing."

Q. Now, have you any evidence of what you would put in writing when you would put it in writing? A. Yes.

Mr. Finch: The contracts are in evidence, your Honor. "Van Horn guaranteed in A-1 shape."

The Court: Is that what you refer to, Mr. Delfino?

A. Yes sir.

Q. Do you have any formal writing that you put in, saying, "We hereby guarantee for 90 days

(Testimony of J. R. Delfino.)

that this car will be guaranteed against any defects in the workmanship?" Did you have anything of that nature you put in?

A. That was our standard policy.

Q. What I want to know, is there any case where you put some formal guarantee of that nature in your contracts of sale?

A. Not that I know of in the last five or six years, we just listed this stuff.

Q. When you referred a moment ago that somebody requested you to put down something, what would you put in?

A. Put in either, "In A-1 shape," or put in, "90 days", or whatever they asked us to do.

Q. Irrespective of what went in the contract?

A. It didn't make any difference.

Q. You would in every case give that service?

A. In every case.

The Court: I have no other questions.

Mr. Finch: I might ask you a little bit about the M.F.D.: Mr. Delfino, how long have you been selling tractors?

A. Since 1930 in San Jose.

Q. Who did you work for?

A. Charles Odean Tractor Company.

Q. That is the predecessor of M.F.D.?

A. That's right.

Q. Your competitors all gave guarantees?

A. We all agreed to give approximately the same.

Q. What kind of a layout do you have there?

(Testimony of J. R. Delfino.)

A. We have a plant. It is about ten to fifteen thousand square feet, I imagine. We overhaul in the neighborhood—we have in the shop, or repair around ten or fifteen tractors and we have had as high as thirty tractors a month for repair. We make a thorough inspection of these used tractors and see that they are in good condition. Not only that, but in all these cases we have been hearing, we take the customer out to the ranch where he would want to buy it. He can bring anybody he wants to look at the machine and if he feels satisfied he wants that machine and he pays a deposit, we take it to the shop and he is welcome to come to our shop and make any inspection he wants. When the tractor is overhauled and when the tractor goes out in the field, if there is something wrong with the machine all he has to do is notify us and we will make the adjustments for 90 days. We always have in the past and always will.

Q. I will show you Repair Order No. 0663, Charles J. Freitas, dated December 4, 1943, for $7.80. Is that one of the repairs made on the tractor?

A. That is one of the repair jobs some time after the tractor was delivered.

Q. Was there any charge?

A. There was no charge.

Mr. Golub: Your Honor, may we object on the ground that this testimony goes to a time some time after the sale? [39]

Mr. Finch: The more to show the good faith.

(Testimony of J. R. Delfino.)

The Witness: As a matter of fact, the customers that I have had personally that were customers of the Charles Odean Company since 1930 are still our customers and we are still selling them all the farm equipment. That I think is showing good faith in maintaining those customers. Sometimes, as late as six or eight months later we make repairs, maintaining customers.

The Court: Can't you lump all these together? What were the total repairs made on the job?

Mr. Finch: Q. That was $7.80, Mr. Delfino?

A. Yes Sir.

Mr. Finch: Does the Court want these in evidence?

The Court: Just ask the witness a question on it.

Mr. Finch: Q. Mr. Delfino, I show you a sales contract, your inventory record: How much did you put in that tractor in the way of repairs before you sold it to Mr. Freitas?

The Court: That is subject to your objection and subject to a motion to strike.

A. I don't have any record here.

Mr. Finch: Q. $60.45, isn't it?

A. Oh, yes, $60.45 on the Freitas tractor.

Q. Now, on Mr. Montes, one of the tractors sold, could you tell how much in the way of repairs was put on Mr. Montes' tractor before he purchased it? A. $113.25.

Mr. Golub: If Counsel has a lump sum for all of these repairs, I will stipulate the repairs were made.

(Testimony of J. R. Delfino.)

Mr. Finch: I have the figures.

The Court: Why don't you read the figures for each of these repairs? If you pile up a big record and one of you are dissatisfied with my judgment, you will have to pay a lot of money to have it written up.

Mr. Finch: Wait a minute. $133 on Mr. Antichi; $129.78 on Van Horn; $20.60 on the Cleghorn Company; $216.93 on the sale to Blocker; $28.37 on the sale to Grecian; $96.25 on the sale to Freitas; $50.23 on the sale to Badame; $36.40 on the sale to Brickerhoff; [40] $45.39 on the sale to Priest; $113.25 on the sale to Montes; $72.26 on the sale to Fong; $244.39 on the sale to Teresi; $78.67 on the sale to Buyak.

The Court: These are repairs that were made after or before the sale.

Mr. Finch: That is both. Repairs that were made after were made on the Teresi car, the Montes car and the Freitas car.

Q. Did any of the others ask you about repairs, Mr. Delfino? A. No sir.

Q. On the Hayes car, that is, under 133, repairs of $67.38 were made before the sales?

A. Yes.

Q. On the Batten sale, also under 133, $31.45 were made before the sale? A. Yes.

TESTIMONY OF R. DELFINO

(Page 81, line 21 to Page 82, line 25)

Q. Will you tell the Court on the sale to Badame, that was an Oliver Standard 60?

(Testimony of R. Delfino.)

A. That's right.

Q. You sold that for a price of $1,000?

A. That's right.

Q. Was that tractor sold within one year of the sale by you? A. Absolutely.

Q. You sold it to Fred Epps on March 26, 1943?

A. That's right.

Q. What happened after that tractor was sold to Epps?

A. It didn't work out and Mr. Taggert of the Federal Farm Security Administration phoned me and asked me if I could switch it over to someone else and they said they wanted to get all they could out.

Q. That was owned by the Farm Security Administration?

A. That was owned by the Farm Security Administration.

Q. And you purchased it from the Farm Security Administration? A. That's right.

Q. Did you take Badame out to show him the machine? A. Yes, we did.

Q. I show you a check on the Anglo-California Bank, payable to the Treasury of the United States. Is that the check you paid on that tractor?

A. That is it.

Q. It shows you paid $820 for the tractor and implements attached to it, $130, is that correct?

A. That's right.

Mr. Finch: I will offer this, if the Court please.

(Testimony of R. Delfino.)

(The check in question was thereupon received in evidence as Defendant's Exhibit F.)

Mr. Finch: Q. Incidentally, there was no written guarantee on the particular Badame sale, was there? A. No sir.

Q. Did you give him an oral guarantee, and if so, what kind?

A. Ninety days—the same as we always have.

TESTIMONY OF VERNA M. SMITH,

witness recalled on behalf of the defendant (Pages 132 to 140)

VERNA M. SMITH

recalled for the defendant previously sworn.

Mr. Finch: Q. Mrs. Smith, on the $198 overcharge, which we admit, on the small items set forth on pages 1 to 9 of the answers to interrogatories, those overcharges were occasioned by figuring freight as part of the cost on which you marked up, is that correct?

A. It was on figuring the percentages and which total we used before and after freight was added.

Q. I will show you a letter here from the Oliver Farm Equipment Sales and Service dated July 8, 1942, to "Oliver Dealers", and ask you if you received that letter.

A. Yes, this is from our files.

Q. And that letter advises that you include the

(Testimony of Verna M. Smith.)

freight in making your markup, is that correct?

A. They wrote us this letter in an attempt——

The Court: No, just answer the question and we will get along faster. [43]

The Witness: They added the freight just to the percentage afterwards.

Mr. Finch: We will offer that in evidence.

The Court: Have you any objection, Counsel?

Mr. Golub: No objection.

Mr. Finch: Merely to show the reason for it, your Honor. It shows they were so advised by their supplier.

(The document in question was thereupon received in evidence and marked Defendant's Exhibit G.)

Mr. Finch: Q. Mrs. Smith, I show you a letter from the San Francisco District Office of the Office of Price Administration bearing no date, signed by Charles Aikin, District Price Officer, by Charles E. Sweet, Price Specialist, on which there is a notation, "Received July 10, 1943," and ask you if that was received by your employer?

A. Yes, this was from our files.

Q. Do you know where that came from?

A. It came from the Office of Price Administration, San Francisco.

Q. Was it mailed to you by your board in San Jose or where?

A. No, I don't believe so. It came from San Francisco.

Q. You do not know where it came from?

(Testimony of Verna M. Smith.)

A. I am not positive.

Q. In these questions and answers on the farm equipment order,—I will read part of it, your Honor. You sold new crawler tractors, too, did you not? A. Yes.

Mr. Finch: (reading) "Sales of new crawler tractors by dealers. "Q. What regulation covers the sales of new crawler tractors sold by dealers to farmers?

"A. Sales of crawler tractors to farmers by dealers are considered to be sales at retail, and are therefore excluded by Maximum Price Regulations 133, 136 and are governed by the general maximum price regulation."

Question 31, sales of used crawler tractors.

"Q. What regulation covers the sales of used crawler tractors to farmers by dealers?" [44]

"A. Sale of a used crawler tractor by a dealer to a farmer would be considered a sale at retail and excluded from Maximum Price Regulation 136, and is placed under the general maximum price regulation."

The Court: What kind of a tractor is that?

Mr. Finch: This is a letter which——

The Court: I mean how does it describe the tractor?

Mr. Finch: It simply says Regulation 136.

The Court: You used some word in describing the tractor.

The Witness: Crawler.

Mr. Finch: A crawler, track type tractor.

(Testimony of Verna M. Smith.)

The Court: It is not a trade name; it is referring to the type of tractor?

Mr. Finch: Yes. A crawler tractor is often loosely known as a Caterpillar tractor, a Caterpillar type.

Q. When you read that, Mrs. Smith, what did you do with respect to your prices then?

A. We didn't do anything. It just served to make the confusion greater.

Q. You did not know where you stood then?

A. No.

Q. You followed 136 on your sales of new tractors notwithstanding this letter, is that right?

A. Yes, we followed 136 on used ones except things that now they find were violations.

Q. You did get this letter, and is that the only advice you got from the OPA on crawler type tractors?

A. That is the only information we have there, except some letters that we asked about 136 and they told us about 133.

Q. Your dealings were mostly on 133?

A. The replies were on 133 because that was farm equipment.

Mr. Finch: We will offer that as defendant's next in order.

(The document in question was thereupon received in evidence and marked Defendant's Exhibit H.)

Mr. Finch: That is all. [45]

(Testimony of Verna M. Smith.)

DEFENDANT'S EXHIBIT "H"

San Francisco District Office
Office of Price Administration
1355 Market Street
San Francisco, California

In Reply Refer To: 8SF:CES(P)

Gentlemen:

The enclosed list of questions and answers are intended to clarify certain of the principal points of Maximum Price Regulation 133, Retail Sales of Farm Equipment. These questions and answers are issued to serve as a guide and are intended to expedite comprehension of the regulation.

These questions and answers cannot be regarded as a substitute for the regulation. The regulation itself establishes your legal duties and in order to protect yourself you must familiarize yourself with it.

Copies of the regulation will be mailed to you upon request.

Yours very truly,

CHARLES AIKIN
District Price Officer

(Signed) By CHARLES E. SWEET
Price Specialist

I. General

(1) Farm equipment defined

1. Q. What is meant by farm equipment?

(Testimony of Verna M. Smith.)

A. Farm equipment means any equipment, attachment, or part used primarily in connection with the production and farm processing for market and farm use of agricultural products but does not include automobiles, trucks, general purpose tools, building materials, electrical equipment, except fence controlers, sprays or other chemicals, commercial processing machinery, livestock, seeds, feeds or any other agricultural products. A partial list may be found in the regulation.

(2) Complete farm equipment defined.

2. Q. What is "complete farm equipment"?

A. Complete farm equipment includes any items of farm equipment which is a complete unit in itself although it may be used only in conjunction with other farm equipment.

(3) Used farm equipment defined.

3. Q. What is considered used farm equipment?

A. Used farm equipment means any farm equipment which has previously been used.

(4) Suggested retail price defined

4. Q. What is meant by the expression, "suggested retail price"?

A. "Suggested retail price" means the price stated in the manufacturer's current list or recommended retail prices f.o.b. factory, whether or not such list price is in the possession of the dealer.

(5) Mail order house prices

5. Q. Are the prices on farm equipment set

(Testimony of Verna M. Smith.)

forth in mail order house catalogues considered "suggested retail prices"?

A. No. The prices issued by mail order houses are not deemed to be suggested retail prices. Maximum prices applicable to the sale of new equipment by mail order houses, whether direct or through retail stores, shall be calculated in accordance with Paragraph (c) of Section 1391.3 of the regulation.

(6) Farm equipment regulations

6. Q. What regulations establish maximum prices for farm equipment?

A. Maximum Price Regulation 133 establishes maximum prices charged by retail dealers for all items of new and used farm equipment and parts. It also sets maximum prices for five (5) important items of used equipment when sold by farmers, auctioneers, and others.

Maximum Price Regulation 246 establishes maximum prices charged by manufacturers and wholesale distributors.

(7) Rationing of farm equipment.

7. Q. Does the Office of Price Administration ration farm equipment?

A. No. The rationing of new farm equipment is administered by the Food Production Administration through the state and county War Boards. A special farm machinery rationing committee functions in each county subject to the provisions of Ration Order C, issued by the Department of Agriculture.

(Testimony of Verna M. Smith.)

(8) Where to obtain priorities to purchase new farm equipment

7. Q. How does a farmer obtain priorities for the purchase of new farm machinery?

A. All such inquiries should be referred to the local farm machinery rationing committee whose office is usually at the Office of Agricultural Adjustment Administration at the county seat.

II. Sales of New Equipment by Dealers

(9) How to figure maximum prices from published list prices

9. Q. How should a dealer compute his maximum price for items of new farm equipment if the manufacturer has a published suggested retail price list?

A. The dealers maximum selling price will be the sum of the following:

(1) The manufacturer's suggested retail price f.o.b. factory.

(2) Freight from the factory to the factory branch at the carload rate less any allowance or rebate. The average combined freight rate is used where shipments are customarily made direct from the factory to the dealer.

(3) Freight from the factory branch to the dealer's place of business at the less than carload rate.

(4) The manufacturer's or wholesaler's handling charge if it is not included in the manufacturer's or wholesaler's price.

(Testimony of Verna M. Smith.)

(5) The dealer's handling charge, which is figured at 5% of the first $400 of the suggested retail price f.o.b. factory plus 2% of the amount in excess of $400.

(6) Ten (10) cents for each mile in excess of 30 miles each way for truck delivery from his place of business. However, the dealer must reduce his handling charge by the actual cost of the service involved if he does not perform the following services:

(a) Erect the equipment

(b) Install attachments

(c) Deliver the new equipment and carry away trade-in equipment.

(7) Federal excise tax, if the tax is billed separately by the manufacturer and is not included in the suggested retail price.

(8) Any special installation charge for fixed equipment, should special installation be necessary. This charge must not be greater than the charge customarily made on April 1, 1942 and it must not be added to the dealer's handling charge as shown in (5) above.

(10) Itemized invoices required.

10. Q. Is the dealer required to supply an itemized invoice to the purchaser of new farm equipment?

A. Yes, in connection with every sale for $15.00

(Testimony of Verna M. Smith.)
or more of new complete farm equipment having a suggested retail price.

(11) Sales of new crawler tractors by dealers.

11. Q. What regulation covers the sales of new crawler tractors sold by dealers to farmers?

A. Sales of crawler tractors to farmers by dealers are considered to be sales at retail, and are therefore excluded by Maximum Price Regulations 133, 136 and are governed by the General Maximum Price Regulation.

(12) Dealers' records and reports

12. Q. What records and reports must a dealer keep?

A. A dealer must keep the following records:

(1) A record of each sale showing the date of sale, make and model of the implement or part, number, total sales price received, and a copy of the invoice or sales check given to the customer.

(2) Whenever trade in equipment is received in part payment of the purchase price of new equipment, the dealer shall keep attached to the record of the ensuing sales of trade-in equipment.

(13) Penalties for violations

13. Q. What penalties are provided for violations of this regulation?

A. Persons violating any provisions of Maximum Price Regulation 133 are subject to the criminal penalties, civil enforcement action, license suspension proceedings, suits for treble damages pro-

(Testimony of Verna M. Smith.)
vided for by the Emergency Price Control Act of 1942.

(14) Filing of copies of invoices given to purchaser

14. Q. Where does a dealer file copies of his invoices or sales checks he gives to purchasers of equipment?

A. All copies of dealer's invoices which are sent to the County Rationing Committee will be filed in the county office.

(15) Handling charges on combines.

15. Q. Will any special handling charges be allowed on combines?

A. No, even though the 5% may not be enough to cover the actual charge in this case, it will be more than enough on other items.

III. Sales of Repair Parts by Dealers

(16) Maximum prices on repair parts.

16. Q. How should a dealer determine his maximum price for new parts which have a suggested retail price?

A. The maximum price is the sum of the following:

(1) Suggested retail price (2) actual freight (3) manufacturer's or wholesale distributors handling charge when not included in freight (4) any extra expense incurred at the request of the purchaser such as telephone calls, etc.

(Testimony of Verna M. Smith.)

(17) Maximum price on repair parts

17. Q. How does a dealer determine his maximum on repair parts which do not have a suggested retail price?

A. Dealer would use, (1) the net price in effect on April 1, 1942 including all extra charges, but not including sales tax, (2) Exception where a price in effect on April 1, 1942 was based on manufacturer's or wholesaler's price to dealer lower than that in effect on April 1, 1942.

(a) Dealer's net price in effect on April 1, 1942

(b) Percentage of increase equal to percentage of increase in manufacturer's or wholesaler's price made prior to April 1, 1942.

(18) Percentage of list on parts may be added in lieu of actual freight

18. Q. May a dealer add a fixed percentage of the list price to parts in lieu of actual freight?

A. Yes, provided he can justify the percentage added in the sense that the total charge so added shall not exceed the transportation charges actually paid by him.

(19) Sales of used parts

19. Q. What regulation covers the sale of used parts?

A. The General Maximum Price Regulation governs the prices to be charged for used parts.

(Testimony of Verna M. Smith.)

(20) Used tractor tires

20. Q. What regulation governs the price of used rubber tractor tires?

A. If the sizes are listed Maximum Price Regulation 107, if not listed, General Maximum Price Regulation.

(21) Extra expense on sale repair parts

21. Q. Can telephone calls made by a dealer to his branch house and other extras incurred by the dealer in obtaining repair parts or delivering them to a purchaser, be included in the price?

A. Yes, but only when such extra expenses are specifically "incurred at the request of the purchaser".

(22) Records on sales of repair parts

22. Q. What type of record should a dealer keep on the sales of repair parts?

A. All that is necessary is a simple book entry record covering the number of the part, the quantity purchased and the price. No sales slip need be given.

IV. Sales of Used Farm Equipment by Dealers

(23) Used equipment acquired before May 11, 1942

23. Q. Is used equipment received in trade prior to May 11, 1942 subject to the regulation?

A. Yes.

(24) Livestock is not farm equipment.

24. Q. Do livestock and other non-farm equipment items accepted in trade and later resold by

(Testimony of Verna M. Smith.)

the dealer come under Maximum Price Regulation 133?

A. No. Only farm equipment is covered. In this connection refer to Section 1361.4 of the regulation which prohibits undervalving goods other than farm equipment received in trade.

(25) Mark-up on used equipment.

25. Q. How does a dealer find his maximum price for used equipment?

A. A dealer finds his maximum price by adding the sum of the following:

(1) The trade-in allowance or purchase price paid by the dealer, or balance due (if repossessed).

(2) $15. or 5% of (1) whichever is greater.

(3) Maximum price paid for repair parts used.

(4) The cost of other mtaerials and labor used in repairing figured at maximum established prices.

(26) Dealers handling charge on used equipment

26. Q. Is a dealer permitted to add a handling and delivery charge on sales of used equipment?

A. No, unless transported 100 miles or more, in which case the actual cost of transportation from the place of purchase to the dealer's place of business may be added.

(27) Guarantee on used equipment

27. Q. Does a dealer have to use the guarantee form as specified in Section 1361.11 of the Regulation?

(Testimony of Verna M. Smith.)

A. Yes. The guarantee may be considered a "minimum guarantee". All its provisions must either be included or exceeded in the guarantee.

(28) Where to secure guarantee forms

28. Q. Does the Office of Price Administration furnish the blank forms for the "guarantee" mentioned above?

A. No. Such forms may be secured from dealer's associations or from the "National Retail Farm Equipment Association".

(29) Base price for five items placed under specific price control

29. Q. In arriving at a base price on tractors, combines, corn pickers, corn binders and hay balers, may freight and handling charges be added to the manufacturer's suggested list price, f.o.b. factory?

A. No, but taxes may be added to all maximum prices, if such tax is stated separately on the invoice.

(30) Sales to other dealers

30. Q. If Dealer "A" purchases a used machine and completely reconditions it, may he resell it as a guaranteed machine to another dealer "B" and thus obtain a 25% mark-up?

A. No, the regulation states that the 25% markup applies only on sales to a user.

(31) Sales of used crawler tractors

31. Q. What regulation covers the sales of used crawler tractors to farmers by dealers?

A. A sale of a used crawler tractor by a dealer

(Testimony of Verna M. Smith.)
to a farmer would be considered a sale at retail and excluded from Maximum Price Regulation 136, and is placed under the General Maximum Price Regulation.

V. Sales of Used Equipment by Farmers, Auctioneers, Etc.

(32) Ceiling prices for certain items

32. Q. Are persons other than dealers subject to ceiling prices in selling used farm equipment?

A. Yes, on sales by actioneers, farmers and all other persons of tractors, combines, corn pickers, corn binders and hay balers. Sales of other items are not covered.

(33) Sales of listed items prior to auction

33. Q. May a farmer who is selling his machinery at auction sell items under price control to friends prior to the auction?

A. The five items are subject to price control no matter to whom sold. You may always sell to anyone at or below the maximum price.

(34) Paint job cannot be added to

34. Q. A farmer spends $50 or $60 repainting and cleaning his tractor prior to a sale. Can he add this sum to his ceiling price? A. No.

(35) Selling above ceiling prohibited

35. Q. Is there any legal manner in which a farmer can sell a tractor or other item of used machinery covered by the reglulation to another farmer at a price higher than the maximum price?

(Testimony of Verna M. Smith.)

A. No, the regulation covers all sales by farmers.

(36) Does the Office of Price Administration set up price lists?

36. Q. Does the Office of Price Administration set up a price list of used farm equipment covered by the regulation so that farmers can determine maximum prices?

A. No such list has been prepared or is contemplated. We are sure that you can get full information on the price of various pieces of equipment from your local dealer. If not, he can get it for you.

(37) Base price clarified

37. Q. Is the base price the suggested list price for the nearest dealer in the neighborhood or the base price f.o.b. factory?

A. The regulation clearly states it is the f.o.b. factory list price.

(38) Joint sales prohibited

38 Q. May a retail dealer, service dealer, auctioneer farmer or any other person sell any of the five listed items, (tractors, combines, corn binders, corn pickers or hay balers) sell jointly with another item of equipment whether listed or not with any other commodity for a lump sum?

A. No, each item of the above list must be sold separately as provided in Amendment #4. This amendment permits the joint sales of one of the listed items together with other items which are specifically designed for mounting on the principle

(Testimony of Verna M. Smith.)

item, provided that the combination is sold as a unit. Any item of equipment which is not mounted on the principal item when being used, is not considered a mounted item and therefore may not be included in a combination sale. For instance: a tractor drawn item of equipment which may be detached and used in connection with some other tractor is not a mounted item and therefore may not be included in a combination sale.

(39) Mounted implements not subject to "ceilings" when sold separately

39. Q. When mounted implements are detached from the principal item and sold separately, are they subject to the percentage of base price ceiling? A. No.

(40) Farmer to farmer sales of used crawler tractors

40. Q. What regulation covers the sales of used crawler tractors by one farmer to another farmer?

A. The answer is the General Maximum Price Regulation.

Cross Examination

Mr. Golub: Q. When did you receive this communication marked Defendant's Exhibit H?

A. July 10, I believe, 1943.

Q. July 10, 1943? A. Yes.

Q. Did you ever receive any other communica-

(Testimony of Verna M. Smith.)

tion from the Office of Price Administration with regard to crawler tractors?

A. Not directly in reference to whether 136 applied or not.

Q. Did you ever write a letter to the Office of Price Administration and ask for that information?

A. We wrote several letters. I don't know the exact dates of them. We have all kinds of letters on them.

Q. Did you receive any replies? A. Yes.

Q. Do you have any of those letters with you?

A. I believe Mr. Finch has one or two.

Mr. Finch: I have one, the only one I know of, and I do not have the original. It dealt with Regulation 133.

The Witness: Yes.

Mr. Golub: Q. You have no correspondence with regard to Regulation 136?

A. We wrote in on two or three occasions and inquired about crawler tractors, and they replied on 133. We inquired about Cle type tractors and they replied on 133 on one occasion. That I remember—saying it was the farm order, and so on. But most of our communications on any of the prices was with the local board by telephone, and we phoned the city several times. I remember talking to Mr. Aikin.

Q. When you received this communication did you take it for granted that crawler tractors were not covered by——

(Testimony of Verna M. Smith.)

A. I did not. We did not know exactly what the order was that controlled used crawler tractors. I remember talking to Mr. Wright about it, the Caterpillar tractor. That was two years ago. We have learned a lot about it since then.

Q. Have you made any attempt to find out about it?

A. Yes, I called him to see if he got it, and he had it in his file, too. [46]

Q. Called whom?

A. Mr. Wright, the Caterpillar dealer.

Q. Did you call the Office of Price Administration?

A. I don't remember. I don't believe I did, about that particular thing.

Q. During the period August 1943 through October 1943 how were you pricing tractors?

A. We were attempting to price them by the 55 and 85 percentages.

Q. And you got those percentages from Maximum Price Regulation 136?

A. We had all kinds of bulletins from the National Retail Equipment Association, also manufacturers, that advised us of these percentages, and there were price meetings. I remember going to one myself, where the man couldn't answer my questions.

Q. Did you have a copy of the regulation at that time?

A. No, I don't believe so. We didn't get the reg-

(Testimony of Verna M. Smith.)

ulations when they first came out. I do not know whether we were on the mailing list or not.

Q. I am not talking about when they first came out, Mrs. Smith, I am talking about the period October 1——

A. We had the original 136, but we did not have the amendments, because Mr. Forsythe, the auditor, and I checked our files. We didn't have them, and he got them together and sent them down to us after that.

Q. During the period August 1, 1943, through October, 1943, you knew you were pricing under some regulation.

A. We were attempting to price according to regulation, yes, but we were never very sure which one to apply. We were not trying to evade the regulations.

Q. And you did not make any inquiries of the Office of Price Administration as to which regulation applied?

A. Yes, we did—not up here in San Francisco maybe, but we called our local board.

Q. What did they tell you?

A. Many things, many different things. They said one time when we inquired about the guarantee, they said under 136 it should be a binding guarantee. That was the original order. I remember that.

Q. Did these trade bulletins you received make any reference to 136?

A. No, they were mostly about 133—I mean

(Testimony of Verna M. Smith.)
from the [47] National Retail Equipment Association. From the factory they were about 136. But there was lots of confusion between the two in the minds of everyone concerned. We know now, but it has taken a long time to get there.

Q. As a matter of fact, this communication you received refers to Regulation 133, does it not?

A. This refers to 136 in those paragraphs.

Q. The letter of coverage refers only to 133, doesn't it?

A. This says Maximum Price Regulation 133, retail sales of farm equipment.

Q. And the questions and answers in there apply only to MPR 133, is that right?

A. According to what Mr. Finch read, it says. It says crawler tractors are not covered by 133 or 136.

Q. Can you find that part for me, please?

A. Just a minute. Wasn't it 11? Yes, it is marked here. It says: "Sales of new crawler tractors by dealers.

"Q. What regulation covers the sales of new crawler tractors by dealers to farmers?

"A. Sales of crawler tractors to farmers by dealers are considered to be sales at retail, and are therefore excluded by Maximum Price Regulations 133, 136 and are governed by the general maximum price regulation."

Q. That is a sale of new crawler tractors?

A. Yes.

(Testimony of Verna M. Smith.)

Q. Is there any reference to used crawler tractors?

A. Yes. He read another one here. I haven't seen this thing for some time. What paragraph was that?

Mr. Finch: 31, I believe.

The Witness: Yes.

"Q. What regulation covers the sale of used crawler tractors to farmers by dealers?

"A. A sale of a used crawler tractor by a dealer to a farmer would be considered a sale at retail and excluded from Maximum Price Regulation 136, and is placed under the general maximum price regulation." [48]

Q. However, you continued after receiving that to price those tractors on a 55 per cent and 85 per cent basis?

A. Well, if I may be permitted to say so——

The Court: Please answer the question. The attorney will argue the matter. He wants to know whether, after you received the notice, you priced your sales of tractors under the 55 and 85 per cent basis.

The Witness: We attempted to, yes sir.

Mr. Golub: Q. That answer there advised you that those tractors were to be priced under the general maximum price regulation, is that correct?

A. Yes.

Q. Did you get a copy of the general maximum price regulation?

A. We have a copy of the general max.

(Testimony of Verna M. Smith.)

Q. Did you see anything in that regulation about 55 and 85 per cent?

A. No. It says, if I remember correctly, that they were to be sold the way they were in March 1942.

Q. You did not see any reference in there to 55 or 85 per cent? A. No.

Q. Why did you use the 55 and 85 per cent?

A. Because that is what we used on our other farm equipment, the wheel tractors, plows, and that kind of thing.

Q. You mean under Regulation 133?

A. Yes.

Q. In other words, you did not make any attempt to price those tractors under general maximum price regulation.

A. Yes, I remember checking several of the tractors for general maximum price.

Q. I don't quite understand your answer.

A. I took several of the prices, after we arrived at them by the 85 per cent, and then checked to see if that exceeded the prices that were charged in March 1942.

Mr. Golub: I have no further questions.

The Court: That is all. [49]

TESTIMONY OF CYRIL M. ODLIN

a witness called on behalf of the defendant (Pages 140, line 21 to Page 146, line 10)

CYRIL M. ODLIN

called as a witness for the defendant; sworn.

The Clerk: Q. State your name to the Court?

A. Cyril M. Odlin.

Direct Examination

Mr. Finch: Q. Mr. Odlin, you are employed by M.F.D. at the present time? A. Yes.

Q. Prior to your employment with the MF.D. you were employed by the Office of Price Administration, were you not? A Yes sir.

Q. And prior to that time you were employed by Dean Tractor Company?

A. No, I was—previous to that I was with the Packard Motor Car Company.

Q. You had been with the Dean Company before that?

A. Right, yes.

Q. What is your job now with the Mechanical Farm Equipment Company?

A. General manager.

Q. As such do you help on price regulations, keeping up with the price regulations that are now being issued? A. Yes sir.

Q. How about the other regulations, such as those of the War Production Board?

A. Everything—follows right through.

Q. Labor? A. Labor.

(Testimony of Cyril M. Odlin.)

Q. That is part of your duties? A. Yes, sir.

Q. At the present time, Mr. Odlin, Mechanical Farm is doing its best to keep up with these regulations and comply with them, is it not?

A. A hundred per cent, yes sir.

Q. Do you have a copy of the new revised Maximum Price Regulation 136? A. Yes sir.

Q. You have read that carefully?

A. Yes sir.

Q. Giving a written form of guarantee which is required by that new order? A. Yes sir.

Q. You have forms of guarantee put out by the National Retail Farm Association?

A. Right. [50]

Q. For use by dealers, and you give those guarantees now on a guaranteed sale?

A. On each sale.

Mr. Finch: That is all.

Cross-Examination

Mr. Golub: Q. I did not understand in what capacity you are employed by the Mechanical Farm Equipment.

A. General manager.

Q. How long have you been employed?

A. Eight months.

Q. When were you employed by the Office of Price Administration, Mr. Odlin?

A. From June, 1942, to October, 1944.

Q. In what capacity?

A. First as chief clerk of the San Jose board,

(Testimony of Cyril M. Odlin.)

rationing board, and then as board relations, San Francisco office.

Q. Did you ever hear of Maximum Price Regulation 136 before you came to work for Mechanical Farm Equipment? A. Oh, yes.

Q. Was it your understanding that Maximum Price Regulation 136 applied to the sale of used crawler tractors? A. At the time——

Q. During the period August, 1943, to October, 1943? A. That was never clear.

Q. Never clear?

A. In the San Francisco office nor in any of the boards.

Q. As a matter of fact, isn't it true when the first regulations came out in 1942 there was confusion, but subsequent interpretations were put out to the trade which clarified that confusion?

A. The digests were put out and other information given, but I do not believe it ever got out to the dealers.

Q. As a matter of fact, other than that interpretation that you just heard Mrs. Smith read, was there ever any interpretation put out by the Office of Price Administration indicating that crawler tractors were not covered by 136?

A. I did not handle that part of it, sir. That was handled by the price officer.

Q. What do you consider cotton farming? Do you consider the production of cotton farming? A. How is that? [51]

(Testimony of Cyril M. Odlin.)

Q. Do you consider the production of cotton farming? A. Yes.

Mr. Finch: We object to that as incompetent, irrelevant and immaterial. What is the purpose of the question?

Mr. Golub: The purpose of the question, your Honor, is this: I am looking at Maximum Price Regulation 136 dated June 30, 1942. There is an appendix on that regulation setting forth certain machines that can be priced on what is called the depreciation method. They are relatively new machines, and one of the machines that is listed in this appendix of this regulation dated June, 1942, is a cotton ginning machine. Now, my point is this, your Honor: if the regulation was never intended to apply to farming operations, why does the regulation cover cotton ginning machines?

Mr. Finch: Your Honor, that is a question of argument.

The Court: You will have to get somebody to answer that question. I couldn't answer it.

Mr. Golub: Q. You say you consider the production of cotton farming?

A. I didn't say the ginning; growing, yes.

Q. Do you know where ginning machines are used?

A. Ginning is the harvesting, I would presume.

Q. Would it be used on a farm?

A. I wouldn't know.

The Court: Q. How large a business does the defendant have?

(Testimony of Cyril M. Odlin.)

A. You mean in volume?

Q. Well, in some way you can describe it to me to indicate the size.

A. It is about a $85,000 business.

Q. Gross a year?

A. Gross business a year, we do about $500,000.

Q. How many employees are there?

A. About 27.

Q. Was that equally true in 1943 as it is now, from your knowledge?

A. Yes, to my knowledge it would be about the same.

Q. What have they got in San Jose? A show room? A. We have a show room.

Q. And a repair department?

A. A repair department—a complete setup of farm equipment.

Q. How many employees are there in the sales end of the business? [52]

A. At the present time——

Q. In 1943? A. One.

Q. Just one? A. Yes.

Q. Where are the bulk of the employees?

A. Repair department.

Q. And maintenance? A. Maintenance.

Q. How large an office force? A. Four.

Q. Were there four in the office force in 1943, do you know? A. Yes, I believe that is right.

Q. Does that include the owner?

A. No, that is exclusive of the owner.

Q. Does the owner actively participate in the business? A. Yes.

(Testimony of Cyril M. Odlin.)

Mr. Golub: Q. Mr. Odlin, I have here Maximum Price Regulation 136 issued June 30, 1942. The last amendment appearing on this is dated November 27, 1942. I will show you the bottom of the first column, the second from the last item. That is included in the appendix of machines covered by that regulation. Would you read that, please?

A. "Crawler and non-agricultural tractors."

Mr. Golub: Your Honor, this regulation, the last amendment to this regulation, is dated November 27, 1942, and in the appendix it definitely states crawler tractors.

Mr. Finch: Crawler and non-agricultural tractors.

The Court: What point are you making by that?

Mr. Golub: The point I am making is this: the testimony of Mr. Odlin is there was confusion as to whether or not crawler tractors were covered by Maximum Price Regulation 136, and Mrs. Smith testified she received a communication stating they were not covered by 136.

Mr. Finch: Not all, just sales at retail. It did not say crawler tractors were not covered by Regulation 136. It said sales to farmers, retail sales were covered.

Mr. Golub: That depends on what you consider to be a sale by retail, which we have not argued yet. Apparently Counsel is going to argue that point.

The Court: Any further questions?

Mr. Golub: No. [53]

TESTIMONY OF AUSTIN CLAPP,

a witness called on behalf of the plaintiff (Page 174, line 9, to Page 177, line 20.)

AUSTIN CLAPP,

called as a witness for the plaintiff in rebuttal; sworn.

The Clerk: Q. Please state your name to the Court.

A. Austin Clapp.

Direct Examination

Mr. Golub: Q. What is your occupation, Mr. Clapp?

A. Attorney at law.

Q. Are you employed by the Office of Price Administration? A. I am.

Q. In what capacity?

A. Regional enforcement executive, San Francisco Region.

Q. How long have you been employed by the Office of Price Administration?

A. Since October, 1942; first with the Washington Enforcement Division.

Q. Since October, 1942?

A. That is right.

Q. What was your position in the Washington Enforcement Division?

A. I was chief of the Industrial Manufacturing Branch of the Enforcement Division, which had under its jurisdiction machinery, commodities, including crawler and wheel-type farm tractors.

(Testimony of Austin Clapp.)

Q. Mr. Clapp, I show you Defendant's Exhibit H and ask you if you have ever seen that before (handing a document to the witness).

A. I have not.

Q. Did you hear the defendant's testimony as to what that contained? A. Yes, I did.

Q. Do you know when such an interpretation was given to the trade and under what circumstances?

A. I do not know anything about this particular interpretation. I do know this, however, about the situation: the question of whether or not crawler tractors when sold to farmers were subject to MPR 136 did not become an issue of any kind until shortly after January 9, 1943. The significance of [54] January 9 was that on that date the Regulation 133 was amended so as to govern sales by one farmer to another. Prior to that time there had been no price regulation for selling a wheel-type tractor by one farmer to another. At the time the market for tractors was extremely active. And then two weeks after the January 9 date there were reports of literally hundreds of violations.

The Court: How is this of any importance?

Mr. Golub: We hope to establish, your Honor, that there were interpretations put out prior to the date of the violations in this case, firmly establishing the fact——

The Court: Ask him that. Let us bring out the fact.

Mr. Golub: Q. Were interpretations issued to

(Testimony of Austin Clapp.)

the trade prior to August, 1943, firmly establishing the fact that crawler tractors sold at retail to certain types of users were subject to the regulation? A. Yes, in March, 1943.

Q. In March, 1943? A. That is right.

Q. Was there ever any doubt so far as the Office of Price Administration was concerned that they were subject to the regulation?

A. Not as far as the Washington office was concerned. Shortly after January 9, which is what I was leading up to, some offices omitting to read the definition of sales at retail in Maximum Price Regulation 136 jumped hastily to the conclusion that the sale of a crawler tractor to a farmer was a sale at retail and did issue at one time interpretations to the same effect as this.

Mr. Finch: We object to the testimony insofar as it decides a question of law.

The Court: Yes. I think I have enough to do to try the facts of this case without going into the whys and wherefores of the regulations as between the main office and the regional office.

Mr. Golub: I won't clutter up the record with any more of that, your Honor.

The Court: I do not really think that that would be of any importance. [55]

Mr. Golub: My purpose in doing that, your Honor, is that this has been introduced showing a state of confusion amongst the trade with regard to whether sales to the trade were covered by Maximum Price Regulation No. 136. By asking

(Testimony of Austin Clapp.)

these questions of the witness I hope to establish long prior to the violations in this case there was no confusion or should not have been had anyone made any effort at all to find what the regulations stated.

The Court: He said the national office issued the interpretation in March, 1943, and there it was. That is about the size of it.

The Witness: That is right, your Honor.

Mr. Golub: Q. Do you know who signed that interpretation there?

A. No. I mean it says here "Charles E. Sweet, Price Specialist," but I do not know him.

Q. You are familiar with the regulations of the Office of Price Administration? A. I am.

Q. Do you know whether or not a price specialist can give an official interpretation?

A. He cannot.

Mr. Golub: That is all.

(From the Reporter's Transcript of June 14, 1945.)

[Endorsed]: Filed Nov. 15, 1945. [56]

[Title of Court and Cause.]

DEPOSITION OF WALTER SHOEMAKER ON BEHALF OF THE PLAINTIFF

(Pages 19, 21 & 24.)

(Page 19)

Q. In your opinion, Mr. Shoemaker, what is the nearest equivalent machine to a Caterpillar tractor Model 50 Diesel?

A. We found that the Caterpillar Model 50 was an obsolete machine, which had a drawbar horse power of 56.03 and that its nearest equivalent current machine is an International TD 14, with a drawbar horse-power of 54.04 horse-power, and with a current selling price of $4325.00 f.o.b. factory.

(Page 21)

Q. Do you have on file the manufacturer's maximum published price for Cletrac Tractor Model AG?

A. Yes; the Cletrac Tractor Model AG is a current machine and the file price with OPA is $1745.00.

Q. And is that price the new base price of the machine? A. That is correct.

(Page 24)

All these items are listed as extras and if added to the machine which we gave as the nearest equivalent for the Diesel 50, the International TD-14, that would have an additional price as follows:

Crankcase guard	$29.75
Radiator guard	42.25
Spark Arrester	4.75
Heavy duty track roller guards	45.00
Front pull hook	16.50

(From the Deposition of Walter Shoemaker on Behalf of the Plaintiff, taken on May 25, 1945, at Washington, D. C.)

[Endorsed]: Filed June 14, 1945. [57]

[Title of Court and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANT WILL RELY ON APPEAL

The defendant having lately filed its Notice of Appeal from the judgment of this Court to the Circuit Court of Appeals for the Ninth Circuit, and having designated portions of the record herein to be contained in the record on appeal, does hereby file its statement of the points on which it intends to rely upon appeal.

1. The District Court erred in deciding that plaintiff was entitled to prosecute this action.

2. The District Court erred in deciding that the sale of tractors by defndant to farmers for use in farming were not retail sales and, as such, expressly excluded from the operation of Maximum Price Regulation 136 (8 F. R. 16132) as amended.

3. The District Court erred in deciding that

the used tractors sold by defendant to Thos. Teresi and T. J. Badami were not rebuilt and guaranteed tractors within the meaning of Maximum Price Regulation 136, if that regulation applied to those sales.

4. The District Court erred in granting an injunction against defendant.

5. The District Court erred in rendering judgment against defendant.

HOWE & FINCH.
By NATHAN C. FINCH,
Attorneys for Defendant and Appellant.

(Affidavit of Mailing.)

[Endorsed]: Filed Nov. 15, 1945. [58]

[Title of Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Defendant having lately filed its notice of appeal from the judgment of this Court to the Circuit Court of Appeals for the Ninth Circuit, hereby designates the following portions of the record and proceedings in this case to be contained in the record on appeal:

1. Amended Complaint.

2. Amended Answer to Amended Complaint.

3. Interrogatories to plaintiff.

4. Answers to Interrogatories.

5. Stipulation of counsel dated February 27, 1945, filed April 12, 1945.

6. Motion to Dismiss filed April 12, 1945.

7. Order for Judgment.

8. Findings of Fact and Conclusions of Law.

9. Judgment.

10. Notice of Appeal and date of its filing.

11. Designation of contents of record on appeal.

12. Statement of points upon which appellant will rely on appeal.

13. Plaintiff's exhibits 1-A to 1-H, inclusive.

14. Plaintiff's Exhibit 3.

15. Defendant's Exhibit H.

16. Testimony of Verna M. Smith, Rep. Tr. pages 25 to 49, line 22.

17. Testimony of Verna M. Smith, Rep. Tr. pages 132 to 140.

18. Testimony of J. R. Delfino, Rep. Tr. page 72, line 11 to page 77, line 24.

19. Testimony of Cyril M. Odlin, Rep. Tr. pages 140 to 146. [59]

20. Testimony of Austin Clapp, Rep. Tr. pages 174 to 177, line 20.

21. The following portions of Plaintiff's Exhibit 5, deposition of Walter Shoemaker:

On page 19 thereof, the following testimony:

"Q. In your opinion, Mr. Shoemaker, what is the nearest equivalent machine to a Caterpillar Tractor Model 50 Diesel?

A. We found that the Caterpillar Model 50 was an obsolete machine, which had a drawbar horsepower of 56.03 and that its nearest equivalent current machine is an International TD-14, with a drawbar horsepower of 54.04, and with a current selling price of $4,3250.00 f.o.b. factory;"

On page 24, the following testimony:

"All these items are listed as extras and if added to the machine which we gave as the nearest equivalent for the Diesel 50, the International TD-14, that would give an additional price as follows:

Crankcase guard	$29.75
Radiator guard	42.25
Spark Arrestor	4.75
Heavy duty track roller guards	45.00
Front pull hook	16.50"

On page 21, the following testimony:

Q. Do you have on file the manufacturer's maximum published price for Cletrac Tractor Model AG?

A. Yes, the Cletrac Tractor Model AG is a current machine and the file price with OPA is $1,745.00.

Q. And that price is the new base price of the machine? [60] A. That is correct.

HOWE & FINCH.

By NATHAN C. FINCH,
Attorneys for Defendant and Appellant.

(Affidavit of Service by Mail.)

[Endorsed]: Filed Nov. 15, 1945. [61]

[Title of District Court and Cause.]

COUNTER DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Plaintiff and appellee hereby counter designates the following portions of the record and proceeding in this case to be contained in the record on appeal:

1. Testimony of J. R. Delfino contained in lines 22 and 23 on page 82 of the reporter's transcript of testimony.

2. Stipulation of counsel dated February 27, 1945, and filed March 3, 1945.

(Signed) HERBERT H. BENT,
Attorney for Plaintiff and Appellee.

[Endorsed]: Filed Nov. 23, 1945. [62]

[Title of Court and Cause.]

ADDITIONAL DESIGNATION BY DEFENDANT AND APPELLANT

Defendant and appellant to the United States Circuit Court of Appeal for the Ninth Circuit hereby designates the following additional portions of the record and proceedings in this case to be contained in the Record on Appeal:

(1) Testimony of J. R. Defino contained on page 81, line 21, to page 82, line 25, of the Reporter's Transcript of testimony.

HOWE & FINCH.
By NATHAN C. FINCH,
Attorneys for Defendant and Appellant.

(Affidavit of Mailing of Copy.)

[Endorsed]: Filed Nov. 27, 1945. [63]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, It Is Hereby Ordered that the appellant herein may have to and including January 7, 1946, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: November 27, 1945.

LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed Nov. 27, 1945. [64]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, It Is Hereby Ordered that the Appellant herein may have to and including January 17, 1946, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: January 4, 1946.

LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed Jan. 4, 1946. [65]

District Court of the United States

Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 65 pages, numbered from 1 to 65, inclusive, contain a full, true, and correct transcript of the records and proceedings in the matter of Chester Bowles, Administrator, Office of Price Administration, Plaintiff, vs. Mechanical Farm Equipment Distributors, Inc., a corporation, No. 23546 G, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and

certifying the foregoing transcript of record on appeal is the sum of $20.00 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 15th day of January, A.D. 1946.

[Seal] C. W. CALBREATH,
Clerk.

M. E. VAN BUREN,
Deputy Clerk. [66]

[Endorsed]: No. 11227. United States Circuit Court of Appeals for the Ninth Circuit. Mechanical Farm Equipment Distributors, Inc., a corporation, Appellant, vs. Chester Bowles, Administrator, Office of Price Administration, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed January 15, 1946.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11,227

CHESTER BOWLES, Administrator, Office of Price Administration,

Appellee,

vs.

MECHANICAL FARM EQUIPMENT DISTRIBUTORS, INC.,

Appellant.

STATEMENT OF POINTS UPON WHICH APPELLANT WILL RELY ON APPEAL

To the Clerk of the Above-Entitled Court:

The record on appeal having been transmitted by the Clerk of the District Court to the Clerk of the United States Circuit Court of Appeals for docketing, the appellant submits herewith its statement of the points upon which it intends to rely upon appeal.

1. The District Court erred in deciding that plaintiff was entitled to prosecute this action.

2. The District Court erred in deciding that the sales of tractors by defendant to farmers for use in farming were not retail sales and, as such, expressly excluded from the operation of Maximum Price Regulation 136 (8 F. R. 16132) as amended.

3. The District Court erred in deciding that the used Caterpillar tractor sold by defendant to Thos.

Teresi and the used Cletrac "AG" tractor sold by defendant to T. J. Badami were not rebuilt and guaranteed tractors within the meaning of Maximum Price Regulation 136, if that regulation applied to those sales.

4. The District Court erred in granting an injunction against defendant.

5. The District Court erred in rendering judgment against defendant.

HOWE & FINCH.

By NATHAN C. FINCH,

Attorneys for Appellant.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed January 18, 1946. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

ORDER WAIVING PRINTING OF ORIGINAL EXHIBITS

Good cause therefor appearing, It Is Ordered that the following original exhibits, viz.:

Plaintiffs 1-A to 1-H, inc., and 3, need not be printed, but will be considered by this Court in their original form .

FRANCIS A. GARRECHT,

Senior United States Circuit Judge.

Dated: San Francisco, Calif., January 26, 1946.

[Endorsed]: Filed January 28, 1946. Paul P. O'Brien, Clerk.

No. 11,227

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MECHANICAL FARM EQUIPMENT DISTRIBUTORS, INC. (a corporation), *Appellant*,	
vs.	
CHESTER BOWLES, Administrator, Office of Price Administration, *Appellee.*	

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

APPELLANT'S OPENING BRIEF.

HOWE & FINCH,
261 Hamilton Avenue, Palo Alto, California,
Attorneys for Appellant.

FILED
MAR 18 1946
PAUL P. O'BRIEN
CLERK

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No. 11,227

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MECHANICAL FARM EQUIPMENT DISTRIBUTORS, INC. (a corporation),

Appellant,

vs.

CHESTER BOWLES, Administrator, Office of Price Administration,

Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

APPELLANT'S OPENING BRIEF.

JURISDICTIONAL STATEMENT.

The pleadings disclose this to be an action brought by the appellee against the appellant under the Emergency Price Control Act of 1942 (56 Stat. 23, 50 U.S. C.A. App. Supp. III, Sec. 901 et seq.), as amended by the Stabilization Extension Act of 1944. (58 Stat. 636.) Judgment for injunction and recovery of treble damages in the sum of $17,656.11 was asked. The appeal is taken from a final judgment of the District Court granting a permanent injunction and awarding damages against appellant in the sum of $4,469.29.

Jurisdiction of the District Court was invoked under Sections 205 (c) and 205 (e) of the Act as indicated in the amended complaint. (Tr. pp. 2-5.) Jurisdiction of this Court is invoked under Section 128 of the Judicial Code. (28 U.S.C.A. Sec. 225.)

STATUTES AND REGULATIONS INVOLVED.

The action involves the Emergency Price Control Act of 1942, as amended, Maximum Price Regulation 133 (7 F.R. 3185), as amended, and Maximum Price Regulation 136 (7 F.R. 3198), as amended, both issued under the Act and hereinafter called MPR 133 and MPR 136.

The pertinent sections of the Act as amended are as follows: Section 205 (e) creates a right of action in the Price Administrator to recover damages not greater than three times the overcharges in excess of the maximum price provided in a regulation issued under the Act charged by a seller to a purchaser who buys for use or consumption "in the course of trade or business." Recovery is limited to the amount of the actual overcharges if the seller proves the violation to be neither wilful nor the result of failure to take practicable precautions against the occurrence thereof. Section 205 (a) of the Act provides for the granting of injunctions against practices constituting violations of the Act.

MPR 136, Section 1390.2 (f), provided for the exclusion from the effect of the order of retail sales.

Section 1390.11 of that order set ceiling prices on sales of used machinery which was guaranteed in writing and so invoiced at 85% of the price of nearest equivalent new machine.

MPR 133, Section 1361.3a contained similar provisions except that the guarantee was required to be written on a prescribed form specified in the order and delivered to the purchaser.

STATEMENT OF CASE AND PROBLEMS INVOLVED.

The amended complaint alleges sales by defendant of used farm tractors, both crawler and wheel types, after August 1, 1943, at prices in excess of MPR 133 as to the wheel tractors, and in excess of MPR 136 as to the crawler tractors.

Defendant's amended answer denied the making of overcharges and alleged as separate defenses that it was entitled to charge the guaranteed prices provided in the orders by reason of oral guarantees given the purchasers, that the sales of the crawler tractors were excluded from MPR 136 as retail sales, and that it took all practicable precautions against the commission of violations which, if any occurred, were not wilful.

It was stipulated that all of the sales of crawler tractors, except one, were made to farmers for agricultural use on their farms or ranches. The exception was a sale for use in lumbering operations.

All of the tractors were orally guaranteed against defects for a period of at least 60 days. Written guarantees were also given on several sales. Defendant reconditioned the tractors sold and fulfilled its oral guarantees by the making of repairs when requested without charge to the purchasers.

The sales took place over a period from August 20, 1943, to October 25, 1943. On July 10, 1943, the San Francisco District Office of plaintiff advised defendant and other farm equipment dealers by form letter that sales of used crawler tractors to farmers were retail sales and, as such, were excluded from MPR 136 and were subject to the General Maximum Price Regulation.

The District Court concluded that MPR 136 applied to the sales of used crawler tractors to farmers, found that neither the oral guarantees nor the written guarantees given by defendant to the farmers entitled defendant to charge the guaranteed prices provided in the regulations and found that defendant's violations were neither wilful nor the result of a failure to take practicable precautions against the occurrence of violations. Judgment for an injunction and for the actual overcharges found was rendered.

The main questions on this appeal are whether MPR 136 applies to the sales of crawler tractors to farmers and whether, if it did, defendant was not entitled to charge the guaranteed price (85% of the base price) on the sales guaranteed in writing rather than the unguaranteed price (55% of the base price).

SPECIFICATION OF ERRORS.

1. The District Court erred in concluding as a matter of law that MPR 136 applied to sales of crawler tractors to farmers. (See Conclusion of Law 1, Tr. p. 21.)

2. The District Court erred in finding as a fact that the tractors sold to Teresi and Badami were not entitled to a reconditioned and guaranteed price, if MPR 136 applied. (See Fact Findings 10 and 13, Tr. pp. 19, 20.)

3. The District Court erred in concluding as a matter of law that plaintiff was entitled to an injunction against defendant.

4. The District Court erred in awarding plaintiff damages under MPR 136 on the sales to farmers.

5. The District Court erred in awarding an injunction against appellant as to MPR 136.

SUMMARY OF APPELLANT'S ARGUMENT.

First: Farming while it is a "trade or business" under the Act, entitling the Administrator to sue, is not an "industrial, commercial or governmental" trade or business. Therefore the sales by defendant to farmers were sales "at retail" as defined and expressly excluded from the operation of MPR 136 and that order furnishes plaintiff no ground of action on such sales.

The plaintiff specifically so construed that order and so advised defendant and the retail farm equipment trade shortly before the sales involved in this case were made.

Second: If our first point be decided adversely, the sales of crawler tractors to Thos. D. Teresi and T. J. Badami were at prices under the ceilings provided in MPR 136 since each sale was of a reconditioned tractor, guaranteed in writing and so invoiced.

Damages in the total sum of $1,485.46 on those two sales were improperly assessed against defendant.

ARGUMENT.

I.

THE SALES OF CRAWLER TRACTORS TO FARMERS WERE RETAIL SALES EXPRESSLY EXCLUDED FROM THE OPERATION OF MPR 136.

(a) The words "industrial" and "commercial" are mutually exclusive and neither includes farming.

All of the sales of tractors in this case were made to farmers for use on their farms with the exception of the tractor sold to H. R. Van Horn, which was for use in lumbering. (Stipulation of Counsel, Tr. pp. 11-12.)

At the time of the sales in this case MPR 136, Section 1390.2 provided as follows:

> "This regulation shall not apply to:
>
> (f) Any sale or delivery at retail of a machine or part by a person other than the manufacturer thereof. For the purpose of this exclusion a sale

> or delivery is deemed to be 'at retail' (1) when made to an ultimate consumer other than an industrial, commercial or governmental user, or (2) * * *''

Under this exclusion a purchase by a farmer for use in farming is a purchase for agricultural use and not for industrial or commercial use upon the proper construction of the quoted clause and in accordance with accepted legal principles. Farming is a "trade or business" but is not an "industrial or commercial" trade or business.

That the San Francisco District Office of plaintiff so construed the language appears clearly in the "Questions and Answers" mailed by the plaintiff to defendant and other members of the trade (Dft's. Ex. H., Tr. pp. 58-71) and received by defendant on July 10, 1943 (Tr. p. 71), shortly before the first of the sales involved in this case. Plaintiff's District Office informed defendant and the trade on three occasions in this communication that the General Maximum Price Regulation, not MPR 136, applied to sales of crawler tractors to farmers. Section 31 thereof (Tr. pp. 68-69) reads as follows:

> "(31) Sales of Used Crawler Tractors
>
> Q. What regulation covers the sales of used crawler tractors to farmers by dealers?
>
> A. A sale of a used crawler tractor by a dealer to a farmer would be considered a sale at retail and be excluded from Maximum Price Regulation 136 and is placed under the General Maximum Price Regulation."

See also Section 11 (Tr. p. 63) so advising on the sale of new crawler tractors and Section 40 (Tr. p. 71) to the same effect on farmer to farmer sales of crawler tractors.

That the San Francisco District Office was not the only office of plaintiff so construing MPR 136 appears clearly in the testimony of Austin Clapp, who was, in 1943, Chief of Industrial Manufacturing Branch of the Enforcement Division in plaintiff's national office. (Tr. p. 84.) He testified that shortly after January 9, 1943, some of plaintiff's offices "jumped hastily" to the conclusion that a sale of a crawler tractor to a farmer was a sale at retail and "did issue at one time interpretations to the same effect as this." (Tr. p. 86.)

Not until September 1, 1943, did plaintiff take any action to indicate it differed with these interpretations issued by its District Offices. On that day it apparently issued an interpretation to the contrary. This "interpretation" is found in 8 Op. & Dec. p. 40: 20-24. No notice of this change of position on the part of plaintiff was sent to defendant. (Tr. p. 57.)

Under such circumstances, were it not for plaintiff's governmental character, a clear case for the application of the doctrine of estoppel would be present, even if plaintiff's change of position of September 1, 1943, was correct.

But plaintiff's subsequent "interpretation" of September 1, 1943, is not correct. The District Offices of plaintiff, in advising the trade as they did on this

point construed MPR 136 in strict accordance with accepted legal principles and decisions uniformly supporting their construction of such language.

While this Court followed the September 1, 1943 interpretation in the case of *Bowles v. Trullinger,* 152 F. (2d) 191 (Dec. 5, 1945), decided after this appeal was taken, the correctness of that interpretation was seemingly accepted without question or argument. We respectfully submit that the *Trullinger* case, insofar as it approves of the September 1, 1943 interpretation, stands alone and is in direct opposition to all previous decisions construing the meaning of such language.

In *Terrace v. Thompson,* 263 U.S. 177, 44 S. Ct. 15, 68 L. Ed. 255, a state statute prohibited the leasing of land to Japanese aliens for agricultural purposes. To the contention that the statute was in conflict with the treaty with Japan permitting Japanese to lease land "for residential and commercial purposes," the United States Supreme Court said,

> "The right * * * 'to lease land for residential and commercial purposes,' or 'to do anything incident to or necessary for trade' cannot be said to include the right to own or lease or to have any title to or interest in land for agricultural purposes. *The enumeration of rights to own or lease for other specified purposes impliedly negatives the right to own or lease land for these purposes."* (Italics ours.)

In *U. S. v. Public Service Co.,* 143 F. (2d) 79, it was held that a tax on electrical energy sold "for domestic or commercial consumption and not for re-

sale" had no application to electricity sold to dairies to use in the pasteurization of milk, since such activity was a processing or industrial operation rather than commercial in character. The Court said,

> "The term 'commercial' may have a broad or a narrow meaning. In its broad meaning it encompasses industrial enterprises or all business. In the narrow meaning of the term 'commercial' is included only those enterprises engaged in the buying and selling of goods. * * * Aside from the regulation, however, the electrical energy is exempt. It was not sold for commercial consumption within the meaning of the act. All industry in a sense is commercial, but admittedly industrial consumption is not included."

In *State v. Smith*, 115 SW (2d) 513 (Missouri Supreme Court 1938), a tax was imposed on sales of electricity "to domestic, commercial or industrial consumers." It was held that sales of electricity to a public service company to propel its streetcars and to a municipality for pumping water were not within the taxing clause. To the contention that the language was broad and all inclusive, the Supreme Court of Missouri said,

> "If 'commercial' is used in its broad sense, it included also the word 'industrial'. * * * If the word 'commercial' includes 'industrial', then why did the Legislature use the word 'industrial' also? We have already seen that every word should be given a meaning in construing a statute if possible; we therefore conclude that the word 'commercial' was not used by the Legislature with the

> intention of including the word 'industrial'. Both were used in the act, not in a broad sense, but, rather, in a restricted sense."

The decisions cited clearly hold that the proper construction of the phrase in question should be narrow and restricted. Under such a construction agricultural use is neither commercial nor industrial.

In *State v. Smith,* supra, the terms were defined as follows:

> "The ordinarily accepted use of the phrase 'commercial establishment' denotes a place where commodities are exchanged, bought, or sold, while the ordinarily accepted meaning of the phrase 'industrial establishment' denotes a place of business which employs much labor and capital and is a distinct branch of trade; as, the sugar industry. Thus we see that the transportation of passengers would not come within the ordinary meaning of either the word 'commercial' or 'industrial'."

Marks Co. v. United States, 12 Ct. Customs App. 110, presented the question whether semi-refined sugar coming from Canada but grown in Cuba was "a product of the soil or industry of the Republic of Cuba imported into the United States" so as to be entitled to a reduction in duty. The Court held that the word "industry" had a limited application distinguishing it from "agricultural" and defined the term to mean "the mechanical and manufacturing activities as distinguished from the agricultural."

See also *In re Yakima Fruit Growers,* 146 P. (2d) 800 (Supreme Court of Washington), holding that

packing house employees were not agricultural laborers, wherein the Court said,

> "Industrial activity commonly means the treatment or processing of raw products in factories."

(b) MPR 136 shows on its face that the principles above set forth were intended to govern its coverage.

It is apparently the contention of the plaintiff that the words "industrial, commercial or governmental" have a meaning synonymous with "trade or business", and that both "industrial" and "commercial" should be construed in their broad sense as though each meant the same thing and included the other. If this is so, we may ask why, by Amendment 96 to MPR 136, issued July 29, 1943 (8 F.R. 10662) Section 1390.2 (f) the exclusionary clause was changed to read:

> "(f) Any sale or delivery at retail of a machine or part by a person other than the manufacturer thereof, except that the sale or delivery at retail of automotive trucks, trailers and buses (as described in Section 1390.33 (c)) shall not be excluded from but shall be covered by this regulation. * * * For the purposes of this exclusion a sale or delivery is deemed to be at retail * * *"

Section 1390.33 (c), added as new items by said amendment

> "New automotive trucks, trailers, and buses, originally designed for use as private or commercial motor vehicles, which are manufactured on or after August 12, 1943, when sold by any person. * * *"

We find it hard to conceive of the use of trucks or buses not made in the course of trade or business.

Plaintiff, apparently, must have deemed such use in trade or business to be possible and yet not covered by MPR 136, else why the express exception of those vehicles from the exclusion? Could it be that the use designed to be included was use of trucks in agricultural operations such as this case or buses for transportation of passengers in commerce such as was involved in the case of *State v. Smith,* supra. We think the inference as to plaintiff's intent is clear. It should also be noted that this amendment evidencing such construction appeared about the same time as the form letter sent to defendant and just before the sales in this case were made.

We also ask—why, if plaintiff knew in January of 1943 from the reports of "hundreds of violations" testified to by its Chief of the Industrial Manufacturing Branch of the Enforcement Division in Washington (Test. of Austin Clapp, Tr. p. 84), it did not amend its order with respect to crawler tractors as it did for trucks, trailers and buses. Instead a letter in exact accordance with defendant's contentions herein was sent by plaintiff to defendant in July, 1943, by the San Francisco District Office and similar "interpretations" went out to dealers from other District Offices. Yet plaintiff's only attempt to indicate a contrary intent is an "interpretation" dated September 1, 1943, and later published in a reporting service never heard of by the dealers who were shortly to be charged with its violation.

The decision of this Court in *Bowles v. Trullinger,* 152 F. (2d) 191, followed that September 1, 1943, "interpretation" without mention of the contrary

cases and impelling reasons for a contrary conclusion set forth herein. We do not differ with the *Trullinger* case holding that a sale to a farmer is for use in trade or business under the Act but we do differ with its holding based on the September 1, 1943, interpretation that farming is a commercial or industrial trade or business under MPR 136. The *Trullinger* case does not constitute a rule of property. It is erroneous. *Stare decisis* does not require that it remain uncorrected if the Court is convinced of its injustice. The language of the Supreme Court in *Helvering v. Hallock,* 309 U.S. 106, 118, is particularly appropriate under such circumstances. There the Court said:

> "But stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience * * *. Surely we are not bound by reason or the considerations that underlie stare decisis to persevere in distinctions taken on the application of a statute which, on further examination, appear consonant neither with the purposes of the statute nor with the Court's own conception of it."

II.

APPELLANT WAS ENTITLED TO THE GUARANTEED PRICE ON THE SALES TO TERESI AND BADAMI IF MPR 136 APPLIED TO THOSE SALES.

(a) Teresi sale.

The District Court found that defendant sold a used Caterpillar "50" crawler tractor to Thomas D. Teresi on October 23, 1943, for the sum of $3,500.00 and that the maximum price at which the tractor could have been sold was $2,454.79. (Tr. p. 20.) The plaintiff's expert witness, Walter Shoemaker, testified that the base price of this tractor was $4,325.00. (Tr. p. 88.) Damages in the sum of $1,045.21 were awarded against defendant on this sale. (Tr. pp. 14-15.) If this machine was reconditioned and guaranteed under MPR 136 the ceiling price was 85% of the base price, $3,676.25, there was no overcharge and the award of these damages was erroneous.

The defendant's records of the sale to Teresi are in evidence as plaintiff's Exhibits 1-A to 1-H. Seller and purchaser signed a contract of sale containing the following guarantee:

> "with respect to the tractor (s) and equipment herein ordered, the distributor or dealer makes to the purchaser the same and no other warranty than the following, to-wit: 90 days Guarantee".

A copy of the contract and guarantee was given the purchaser. (Tr. p. 29.) The defendant followed a practice of orally guaranteeing all tractors selling for over $500.00 for 90 days. (Tr. p. 29.) Before making such guarantees defendant inspected and overhauled

the tractors in its shop. (Tr. p. 50.) The defendant's oral guarantees meant and were understood to mean that defendant obligated itself to maintain and keep the tractor in good working order for 90 days both as to defective parts and workmanship. (Tr. p. 48.) Defendant did not evidence its guarantees in writing as a rule. (Tr. p. 48.) Regardless of the writing or lack of writing evidencing its guarantees, defendant performed and made good on its representations. (Tr. pp. 49-50.)

The defendant, in fact, furnished the purchaser, Teresi, with $244.00 worth of free service to the tractor sold to him within the 90 day guarantee period following the sale. (Tr. pp. 28, 52.) The repair bills in evidence, plaintiff's Exhibits 1-A to 1-H, clearly show the character, time and amounts of these repairs.

The sale was guaranteed. It was also so invoiced. "Invoice" is defined in Webster's New International Dictionary as "a written account or itemized statement, of merchandise shipped or sent to a purchaser, consignee, factor, etc., with the quantity, value or prices, and charges annexed".

The contract of sale to Teresi was itself the invoice. It likewise contained the written guarantee. The order should not be construed to require a seller to give the purchaser two pieces of paper when one will suffice. Plaintiff is seemingly contending that the defendant's sales tags should also show the fact of guarantee. The plaintiff's position might have some merit if the order required the seller to furnish the purchaser with a separate guarantee on the specified form prescribed

by the order such as is required by MPR 133. But MPR 136 only required that the guarantee be in writing. We submit that the delivery to the purchaser of a duplicate contract of sale containing the written guarantee and being itself the invoice entitled defendant to charge the guaranteed price provided in the order.

(b) Badami sale.

On September 13, 1943, defendant sold a used "A.G." Cletrac crawler tractor to T. J. Badami for the sum of $1,400.00 pursuant to a written contract of sale (Ptf's. Ex. No. 3) containing a guarantee as follows "2 mo. on faulty material." The Cletrac "A.G." model was a current machine with a base price of $1,745.00. (Tr. p. 88.) The District Court awarded damages in the sum of $440.25 against defendant, taking the sum of $959.75 as defendant's ceiling on the sale. If this machine was reconditioned and guaranteed under MPR 136 its ceiling price was $1,483.25, there was no overcharge and the award of damages on the sale is erroneous.

Defendant expended the sum of $50.23 in reconditioning this tractor for sale and no repairs were made or requested to be made during the guarantee period. (Tr. p. 52.)

As in all of the sales made by the defendant the purchaser received a duplicate of the sales contract, which contract was also the invoice. The judgment should be further reduced in the sum of $440.25, the damages awarded on this sale.

III.

THE ISSUANCE OF AN INJUNCTION WAS NOT PROPER UNDER THE FACTS IN THIS CASE.

Regardless of the applicability of MPR 136 to the sales of crawler tractors to farmers, the issuance of an injunction against defendant in this case was an abuse of discretion.

The issuance of an injunction under the Act is not mandatory, *Bowles v. The Hecht Co.*, 321 U.S. 321.

In *Bowles v. Arlington Furniture Co.*, 148 F. (2d) 467 (CCA 7th) it was held that an injunction against violations of MPR 136 under facts far less challenging to a sense of justice than those in the instant case was an abuse of discretion requiring reversal of the judgment.

CONCLUSION.

The judgment is erroneous insofar as it awards damages under MPR 136 on the sales to farmers and should be reduced by the sum of $3,600.11. If the Court determines that MPR 136 did apply to the sales of crawler tractors to farmers the judgment for damages is erroneous in the sum of $1,485.46, the damages awarded on the guaranteed sales to Teresi and Badami and should be reduced by that amount.

Dated, Palo Alto, California,
March 15, 1946.

Respectfully submitted,
HOWE & FINCH,
By NATHAN C. FINCH,
Attorneys for Appellant.

No. 11,227

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MECHANICAL FARM EQUIPMENT DISTRIBUTORS, INC. (a corporation),
Appellant,

vs.

CHESTER BOWLES, Administrator, Office of Price Administration,
Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

GEORGE MONCHARSH,
Deputy Administrator for Enforcement,
MILTON KLEIN,
Director, Litigation Division,
DAVID LONDON,
Chief, Appellate Branch,
HAROLD CRASKE,
Attorney,
Office of Price Administration,
Washington 25, D. C.,
HERBERT H. BENT,
Regional Litigation Attorney,
WILLIAM H. BRUNNER,
District Enforcement Attorney,
Office of Price Administration,
San Francisco 3, California,
Attorneys for Appellee.

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CLERK

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No. 11,227

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MECHANICAL FARM EQUIPMENT DISTRIBUTORS, INC. (a corporation), *Appellant,*
vs.
CHESTER BOWLES, Administrator, Office of Price Administration, *Appellee.*

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

JURISDICTION.

This is an appeal from a final judgment (R. 15) in an action brought by the Price Administrator pursuant to Sections 205(a) and 205(e) of the Emergency Price Control Act (50 U.S.C. App. §925, 56 Stat. 23) for an injunction and treble damages. Jurisdiction of the District Court was invoked under Section 205(c) of the Act, and jurisdiction of this court is invoked under Sections 128 and 129 of the Judicial Code (28 U.S.C., secs. 225, 227).

THE STATUTE AND REGULATION INVOLVED.

This action arises under the Emergency Price Control Act and Maximum Price Regulation No. 136 (7 F.R. 3198) (hereinafter referred to as MPR 136). Section 205(a) of the Act, in its pertinent portions, reads as follows:

> "Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond."

Section 205(e), as pertinent, provides as follows:

> "If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the over-

charge, or the overcharges, upon which the action is based as the court in its discretion may determine * * * Provided, however, That such amount shall be the amount of the overcharge or overcharges * * * if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilful nor the result of failure to take practicable precautions against the occurrence of the violation. For the purposes of this section * * * the word 'overcharge' shall mean the amount by which the consideration exceeds the applicable maximum price * * *"

§1390.11 of MPR 136, in its pertinent portion provides:

"(1) A 'second-hand machine or part' is any machine or part which has previously been used.

"(2) A 'rebuilt and guaranteed' machine or part is a machine or part (i) in which all worn or missing components which should have been replaced or repaired for satisfactory operation have been replaced or repaired, (ii) which carries a binding written guaranty of satisfactory operation for a period of not less than 60 days, and (iii) which is expressly invoiced as a rebuilt and guaranteed machine or part or its equivalent, and in addition, in those cases where the machine or part operates under power or pressure, has been tested under power or pressure so as to prove that it has a substantially equivalent performance to that of a new machine or part * * *

"(3) The 'new base price' * * * means the highest maximum price established by this or any other Regulation issued by the Office of Price

Administration to any class or purchasers for the nearest equivalent new machine or part, f.o.b. manufacturer's plant.

*   *   *   *   *   *   *

(b) *Maximum price: rebuilt and guaranteed second-hand machines and parts.* The maximum price for any rebuilt and guaranteed second-hand machine or part shall be * * *

(1) 85% of the new base price for such machine or part, * * *

(c) *Maximum price: second-hand machines and parts which are not rebuilt and guaranteed.* The maximum price for any second-hand machine or part which is not rebuilt and guaranteed shall be * * *

(1) 55% of the new base price for such machine * * *"

§1390.26 of MPR 136 provides, in pertinent part:

"*Records and Additional or substituted reports* —(a) *Records.* Persons subject to this Maximum Price Regulation No. 136, as amended, shall keep available for inspection by representatives of the Office of Price Administration records of the following:

*   *   *   *   *   *   *

"(4) *By a seller other than the manufacturer.* Records of the kind such seller has customarily kept, relating to the prices of machines and parts sold after the effective date of this Maximum Price Regulation No. 136, as amended, and, in addition, records showing as precisely as possible the basis upon which maximum prices for machines and parts have been and are determined."

STATEMENT OF THE CASE.

The amended complaint (R. 2-5) charged the defendant with selling certain farm equipment, to-wit: used crawler tractors, at retail, at prices in excess of the maximum prices established by MPR 136 and that none were purchased for use or consumption other than in the course of trade or business. The complaint prayed for judgment in treble the amount of the overcharges and for an injunction enjoining the defendant from selling, delivering or offering for sale or delivery tractors in violation of the regulation (R. 4-5).

The appellant's answer (R. 7-10) denied all the allegations of the complaint, except that of jurisdiction, and pleaded four separate defenses: (1) That none of the defendant's overcharges were wilful and that it took all practicable precautions against the occurrence of the violations; (a) that the alleged overcharges are based upon the difference between the maximum prices, prescribed in the regulation, of used unguaranteed tractors and of reconditioned tractors accompanied by a written guarantee; that the regulation as originally promulgated did not require a guaranty in writing, and that every tractor sold by the defendant at the reconditioned and guaranteed price, was in fact reconditioned and orally guaranteed; (3) that crawler tractors sold to farmers are not subject to MPR 136 and (4) that the violations had occurred in the past and have been corrected.

The following facts were established either through uncontradicted testimony at the trial, or by stipulation:

The defendant, a dealer in used farm tractors, had sold thirteen used crawler type tractors to that number of purchasers, all of whom were in the business of farming and who purchased the machines for use on their farms (R. 11-12), except one H. R. Van Horn, who purchased such tractor for use in his lumbering business (R. 11). Several other tractors were similarly purchased from the defendant at prices which in the aggregate, were 198.68 above the appropriate ceilings and which overcharges were admitted (R. 12).

A Mrs. Verna M. Smith, Secretary of the defendant corporation, testified that the defendant kept no records showing the basis upon which maximum prices were determined pursuant to MPR 136 (R. 24-28), and admitted that the defendant "never compared them [tractors sold by defendant] with competitive models. We used our own models, what they were nearest to, or to Capterpillar, whose models, horse power for horse power, were nearest to ours, right down the line" (R. 24). It was admitted, further, that the defendant did not maintain the records which the regulation required, showing the manner in which its selling prices were calculated (R. 24-28).

The defendant conceded that all of its sales, in question, were made without written guarantees, except that one of the tractors was sold to one T. J. Badame with a notation on the contract of sale to the effect that faulty material was guaranteed against for

two months (R. 46), and in the sale to one Thos. D. Teresi, the brief remark "90 days guarantee", also endorsed only on the contract (Plaintiff's exhibits 1-A to 1-H).

The defendant introduced a circular letter received by it from the San Francisco office of OPA (Exhibit R. 57-71), which purported to advise dealers that a sale of a used tractor crawler to a farmer was excluded from MPR 136 and was covered by General Maximum Price Regulation (Question 31, R. 67-68). But Mrs. Smith admitted that the defendant did not follow the instructions contained in this circular letter, but continued to price its tractors by the 55 and 85 per cent formulae provided in MPR 136 (R. 72-73, 76-77).

The District Court ordered judgment against appellants for $4,469.29, the actual amount of the overcharges, and for an injunction (R. 14-16). Findings of Fact and Conclusions of Law were filed August 23, 1945 (R. 16-22). Judgment was entered the same day (R. 15-16). Notice of appeal was filed by the defendant on October 19, 1945 (R. 22-25).

ARGUMENT.

I.

THE SALES BY THE DEFENDANT WERE COVERED BY MPR 136.

MPR 136, which controls the maximum sales prices for used crawler tractors, provided in § 1390.2, for exclusion, from its application, of certain types of sales. Among such exempted categories was that defined in § 1390.2 (f) as:

> "Any sale or delivery at retail of a machine or part by a person other than the manufacturer thereof * * * For the purpose of this exclusion, a sale or delivery is deemed to be 'at retail' (1) when made to an ultimate consumer, other than an industrial commercial, or governmental user * * *"

The defendant now contends, in Point I of its brief, that the sales in question (aside from the one to Van Horn, the lumberman) (R. 11) are among those intended to be excluded, because the purchasers, while admittedly in the trade or business of farming, were not "commercial users" within the purview of § 1390.2(f). Such an argument is so implausible and self-contradictory on its face that it was summarily rejected in *Speten v. Bowles*, (8th Cir. 1945) 146 F. (2d) 602, 604, Cert. den. 324 U.S. 877 with the observation that it is but "an *ipse dixit* that calls for no reply". The *Speten* decision was adopted by this court in *Bowles v. Trullinger,* (C.C.A., 9, 1945) 152 F. (2d) 191. See also *Bowles v. Rogers,* (C.C.A., 7, 1945) 149 F. (2d) 1010; *Bowles v. Babar,* 54 F. Supp. 453 (E.D. Mich., 1944).

In the *Trullinger* opinion, this court further rested its conclusions upon an official interpretation issued by the OPA:

> "For further authority we quote Interpretation of Maximum Price Regulation 136 as issued September 1, 1943, to be found in Metal and Machinery Desk Book, 60:-403:
>
> " '*Crawler type tractor sold by one farmer to another.* The sale of crawler tractor by one

farmer to another is subject to the regulation. Such a sale is not a sale "at retail", except pursuant to Section 1390.2(f), because a farmer is a commercial user. A farmer is considered a commercial user, since he operates his farm as a commercial activity and purchases the equipment for use in carrying out that activity.' "

This court's acceptance of the official interpretation was, of course, consonant with the line of decision holding that the administrative interpretation "is of controlling weight unless plainly erroneous or inconsistent with the regulation". *Bowles v. Seminole Rock & Sand Co.,* 325 U.S. 410, 414; *Bowles v. Crawford-Doherty Co.,* (C.C.A. 9, March 16, 1946); *Bowles v. Mannie & Co.,* (C.C.A. 7, March 1946).

But the defendant, in the face of this official interpretation, argues that the circular letter of the San Francisco district price specialist (See question 31, R. 68-69) should be controlling, and that the advice or opinion contained in that letter should in effect create "an estoppel". There are two complete answers to such contention: (1) The San Francisco letter is not binding upon the Administrator and (2) There could be no estoppel aspect since the defendants did not rely upon the opinion contained in such letter.

The San Francisco "Price Specialist" cannot bind the agency.

Even assuming that the defendant had relied upon the circular letter of Mr. Sweet, a district office Price Specialist, it cannot set up such letter as a defense. OPA Revised Procedural Regulation No. 1 (7 F.R. 8961) OPA Service p. 310:51, provides in §54:

"*Interpretations.* An interpretation rendered by an officer or employee of the Office of Price Administration with respect to any provision of the Act or of any regulation, price schedule, order, requirement, or agreement thereunder, will be regarded by the Office of Price Administration as official only if such interpretation was requested and issued in accordance with §55 of this regulation. Action taken in reliance upon and in conformity with an official interpretation and prior to any revocation or modification thereof or to any superseding thereof by regulation, order or amendment, shall constitute action in good faith pursuant to the provision of the Act, or of the regulation, price schedule, order, requirement or agreement to which such official interpretation relates. An official interpretation shall be applicable only with respect to the particular person to whom, and to the particular factual situation with respect to which, it is rendered, unless publicly announced as an interpretation of general application."

§55(b) thereof further provides:

"*Interpretation to be written; authorized officials.* Official interpretations shall be given only in writing, signed by one of the following officers of the Office of Price Administration: the Price Administrator, the General Counsel, any Associate or Assistant General Counsel, any Regional Attorney, any Regional Price Attorney, any District Price Attorney, and any Division Counsel to a Price Division or Chief Counsel to a Price Branch in the Office of Price Administration, Washington, D.C.: Provided, That interpretations of general application shall be announced

> only by the Price Administrator, the General Counsel, any Associate or Assistant General Counsel, or any Regional Attorney or any Regional Price Attorney."

It is thus apparent that the contents of a letter issued by an employee unauthorized to bind the agency cannot operate as an estoppel against the government, and that the defendant's profession of reliance upon the informal advice of such a subordinate could not serve to exculpate it. Such was the conclusion reached in *Wells Lamont Corp. v. Bowles,* 149 F. (2d) 364, 367 (Em. App., 1945), where a defense of reliance upon an unofficial interpretation was disallowed, the court observing:

> "* * * At first blush, this may seem harsh but, obviously, the Administrator cannot be bound by various oral interpretations which happen to be made by his hundreds, perhaps thousands, of employees, in violation of published regulations. He has prescribed a reasonable procedure by which persons subject to the regulations may obtain official interpretations, by which all will be bound. Complainant is not entitled to rely on an unofficial interpretation."

See: *Bowles v. Indianapolis Glove Co.,* 150 F. (2d) 597, 599 (C.C.A. 7, 1945) (disallowing a defense based upon an unofficial written interpretation); *Bowles v. Mannie & Co.,* (C.C.A. 7, March 1946).

Furthermore, the defendant did not rely upon Mr. Sweet's letter. Mrs. Smith, secretary of the defendant corporation, testified that the letter was received

on July 10, 1945 (R. 71) but that the defendant, after its receipt, still did not know "what the order [Regulation] was that controlled used crawler tractors" (R. 73). Mrs. Smith called her local caterpillar tractor dealer for information concerning the effect of the Sweet letter, but did not inquire of the local office of the OPA (R. 73). *Despite Mr. Sweet's circular letter, the defendant continued to price such tractors according to 55 and 85 per cent formulae provided in MPR 136* (R. 73, 76), *and did not attempt to price them under General Maximum Price Regulation.*[1] Indeed, Mrs. Smith admitted that the defendant, notwithstanding the letter, "followed [MPR] 136 on [sales of] used ones except things that they now find were violations" (R. 57). Under such circumstances, there is no proof of reliance upon the unofficial interpretation. But, whether the appellant actually relied upon such unauthorized interpretation or not, the court below gave the seller the benefit of the doubt when it awarded damages limited only to the amount of the actual overcharges.

---

[1]General Maximum Price Regulation provides for maximum prices based upon those prices charged during a base period, usually March, 1942. It contains no provision for the 55% and 85% bases under discussion.

II.

THE DEFENDANT VIOLATED MPR 136 BY SELLING AT PRICES IN EXCESS OF THOSE PROVIDED FOR SECOND-HAND TRACTORS WHICH HAD NOT BEEN REBUILT, TESTED AND GUARANTEED.

§1390.11(b)(1) provides that, as applicable to the tractors under consideration, the maximum price for a rebuilt, tested, and guaranteed machine, shall be 85% of the new base price, whereas the legal price for such second-hand tractor, when not rebuilt and guaranteed, shall be only 55% of the new base price. (For text of §1390.11(b) see p. 4, supra).

In Point II of its brief, the appellant contends that the tractors which it sold to Teresi and Badami, were "guaranteed" within the meaning of MPR 136, and therefore could legally be sold at 85% of the base price. But this contention is not supported by the facts.

In the Teresi transaction, the defendant endorsed on the contract of sale the following notation:

> "with respect to the tractor and equipment herein ordered, the distributor or dealer makes to the purchaser the same and no other warranty than the following to wit: 90 days guarantee".
>
> (Plaintiff's exhibits 1-A to 1-H.)

In the Badami sale, the defendant endorsed, also on the contract of sale, the remark:

> "The distributor or dealer makes to the purchaser the same and no other warranty than the following, to wit: 2 months on faulty material".
>
> (Plaintiff's exhibit 3) (R. 46).

In the case of both these sales, the sketchy notations on the contracts fail entirely to measure up to the requirements for a guaranty of a rebuilt and guaranteed machine, specified in §1390.11 (2) of HPR 136 (See text, p. 3). Thus, the regulation provides that such a machine must: (i) have all worn or missing parts repaired or replaced for satisfactory operation, (ii) carry a binding written guaranty of satisfactory operation for a period of not less than 60 days; and (iii) *be expressly invoiced* as a rebuilt and guaranteed machine which was tested under power to prove it has a substantially equivalent performance to that of a new machine.

In no sense does the meager and self-limiting language endorsed on the Teresi and Badami contracts (as further distinguished from the required representations in the invoices themselves) meet the requirements of the regulation. Nor is this deficiency of a purely technical nature, as scrutiny of the regulation's realistic definition of a "rebuilt" machine indicates. The defendant's testimony alone proves the value of the regulation's requirements which must be met before a tractor may be sold on reconditioned, tested, and guaranteed basis. In the case of the Teresi tractor, no repairs, or work of any kind was performed on the machine, until *after* it had been sold (R. 52), while a total of $50.23 was expended by the defendant on the Badami tractor, both *before and after* the sale (R. 52). It is thus apparent that the defendant's technique was to charge the reconditioned and guaranteed price for an ordinary use "as is" machine, on

the gamble that no defects would show up during the period of its informal guaranty. But such a procedure is a far cry from the overhauling, power-testing and formal guaranteeing necessary to justify the charging of the 85% price.

III.

THE ISSUANCE OF AN INJUNCTION WAS JUSTIFIED BY THE FACTS OF THIS CASE.

Even assuming that the advice contained in Mr. Sweet's letter could have misled a seller of used crawler tractors, the proof shows that no reliance was placed upon it by the defendant. There can be no question but that the defendant knew of the requirements of §1390.11(a)(2), since it also priced used tractors on the 55% level (R. 73). It is significant, then, that the defendant must have been aware of the requirements of MPR 136 which had to be met before a used machine could be sold for 85%, rather than 55% of the base price. Furthermore, as the defendant admitted (R. 73): "we had all kinds of bulletins from the National Retail Equipment Association, also manufacturers, that advised us of these percentages, and there were price meetings * * *"

It thus appears conclusive that the defendant knew of the requirements to be met, before the 85% price could be charged, and elected to ignore them—with the same indifference with which it flouted the regulation's record keeping requirements (R. 24-28).

Clearly, there was no abuse of discretion on the part of the District Court. *Bowles v. Montgomery Ward Co.*, 143 F. (2d) 38 (C.C.A. 7, 1944); *Bowles v. Cudahy Packing Co.*, (C.C.A. 3, March 29, 1946); *Bowles v. Sanden-Ferguson Co.*, 149 F. (2d) 320 (C.C.A. 9, 1945); *Bowles v. 870 Seventh Ave. Corp.*, 150 F. (2d) 819 (C.C.A. 2, 1945).

The defendant cites *Bowles v. Arlington Furniture Co.*, (7th Circ. 1945), 148 F. (2d) 467 for the proposition that the injunction here granted was an abuse of discretion. But the court in the *Arlington* case found that there was, at best, one technical violation; that there had been an honest difference of opinion as to the proper interpretation of MPR 136 in its application to the particular facts, which difference the defendant there made every effort to resolve, and that an injunction would serve no useful purpose since the defendant was out of business. It is submitted that no such grounds exist in the present appeal.

CONCLUSION.

The money judgment and the injunctive decree were fully warranted by the undisputed evidence and should be affirmed.

Dated, April 19, 1946.

Respectfully submitted,

George Moncharsh,
Deputy Administrator for Enforcement,

Milton Klein,
Director, Litigation Division,

David London,
Chief, Appellate Branch,

Harold Craske,
Attorney,
Office of Price Administration,
Washington 25, D. C.,

Herbert H. Bent,
Regional Litigation Attorney,

William H. Brunner,
District Enforcement Attorney,
Office of Price Administration,
San Francisco 3, California,

Attorneys for Appellee.

No. 11235

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

VICTOR H. ROSSETTI and FRANK P. DOHERTY, co-executors of the estate of Genevieve Borlini Hill,

Appellants,

vs.

PETER S. HILL, JOANNE HILL, also known as Joan A. Hill, PATRICIA HILL HARDER and THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,

Appellees.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

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FILED

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

No. 11235

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

For Appellants:

LAWLER, FELIX & HALL
800 Standard Oil Building
Los Angeles 15, California

For Appellees Peter B. Hill et al.:

RICHARD H. FORSTER
530 West Sixth Street
Los Angeles 14, California

For Appellee The Northwestern Mutual Life Insurance Company:

O'MELVENY & MYERS
433 South Spring Street
Los Angeles 13, California [1*]

*Page number appearing at foot of Certified Transcript.

In the District Court of the United States for the
Southern District of California
Central Division

No. 4462-M Civil

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, a corporation,

Complainant,

vs.

PETER B. HILL; JOANNE HILL, also known as Joan A. Hill; PATRICIA HILL HARDER; VICTOR H. ROSSETTI and FRANK P. DOHERTY, co-executors of the estate of Genevieve Borlini Hill; DOE ONE; DOE TWO; DOE THREE and DOE FOUR,

Defendants.

BILL OF INTERPLEADER

To the Honorable Judges of the District Court of the United States, for the Southern District of California, Central Division:

The Northwestern Mutual Life Insurance Company, a corporation organized and existing under the laws of the State of Wisconsin, and a citizen of said State, brings this its bill of interpleader against the defendants above named, and each of [2] them, and alleges:

1. The ground upon which the jurisdiction of this court depends is as follows: This duly verified bill of interpleader is filed by complainant, an insurance corporation, resident and citizen of the State of Wisconsin, having in its possession money of the value of $10,060.10 against certain adverse claimants, all of whom are citizens and residents of the State of California, and one or more

of whom reside within the Southern District of California, Central Division. That said claimants are severally claiming to be entitled to said sum of money now in the possession of claimant.

2. (a) The complainant, The Northwestern Mutual Life Insurance Company, is now and at all times herein mentioned has been a corporation organized and existing under the laws of the State of Wisconsin, and is a citizen of said State.

(b) Defendants Victor H. Rossetti and Frank P. Doherty are the duly qualified and acting co-executors of the estate of Genevieve Borlini Hill now being probated in the County of Los Angeles, State of California, bearing Superior Court No. 239479.

(c) The remaining defendants and each of them are now and at all times herein mentioned have been residents in and citizens of the State of California.

3. Defendants Doe One, Doe Two, Doe Three and Doe Four are sued herein by fictitious names for the reason that their true names and capacities are unknown to complainant, and complainant will ask leave of this court to amend this bill of [3] interpleader by substituting their true names and capacities whenever the same shall be ascertained.

4. Complainant is now and at all times herein mentioned was authorized to engage in the business of life insurance in the State of California.

On or about December 2, 1942, complainant herein for and in consideration of the premiums paid and to be paid by one George A. Hill, Jr., and other considerations, issued to said George A. Hill, Jr., a certain contract of life insurance designated and bearing No. 3204489. One

Genevieve B. Hill was named as direct beneficiary of said policy of insurance. "Peter B. Hill, Joanne Hill and Patricia Hill Harder, children, share and share alike, the survivors or survivor" were named contingent beneficiaries of said policy of insurance. On or about November 24, 1944, said George A. Hill, Jr. died and proof of death as required by said insurance policy was duly submitted to complainant. On and after the death of said George A. Hill, Jr. the amount due on said insurance policy was and is $10,060.10.

5. Defendants Victor H. Rossetti and Frank P. Doherty, co-executors of the estate of Genevieve Borlini Hill, have notified complainant that they claim the entire proceeds of said policy of insurance. A claim to the proceeds of said insurance has been filed with complainant by defendants Patricia Hill Harder and Joan A. Hill and Peter B. Hill.

6. As hereinbefore alleged, conflicting claims are being made upon complainant for and on account of said sum of $10,060.10. Complainant admits its liability for said amount [4] of insurance upon the life of said George A. Hill, Jr. and alleges that the claims of said respective defendants and each of them are being made upon it in good faith by each of said defendants, and complainant cannot safely determine for itself which claims are right and lawful and cannot safely make payment of all or any part of said money to any of said defendants and under the circumstances is in danger of being subjected to a multiplicity of claims and actions on a single liability. Complainant makes no claim to any of said money and is indifferent to the claims or rights of said defendants. *Complaint* desires to pay said sum into the registry of this court to be disposed of in accordance

with the judgment thereof. This action has been brought by complainant without collusion as respects any of said defendants.

7. Contemporaneously with the commencement of this action complainant is paying into the registry of this court to await the judgment thereof the sum of $10,060.10, which said sum constitutes all moneys held by complainant due by reason of said policy of insurance.

8. It was necessary for complainant to institute this action in order to avoid a multiplicity of suits and to avoid unnecessary costs, attorneys' fees and expenses of suit and to prevent irreparable damage to complainant. In order to institute this action it was necessary for complainant to employ and it has employed the attorneys now appearing on its behalf to prepare this bill of interpleader and to file and prosecute this action, and it has become and is liable to pay to them reasonable compensation for their services. All of said expenses have been incurred by [5] complainant in good faith and were necessitated by the conflicting claims of defendants herein.

Wherefore, complainant prays

1. That defendants, and each of them, be required to plead and litigate between themselves concerning the claims to the money held by complainant by reason of said policy of life insurance and herewith deposited into the registry of this court, and that defendants, and each of them, be required to set forth in full their interests and claims in and to said moneys.

2. That complainant be relieved and discharged from all liability under or in any way arising out of said policy of life insurance No. 3204489 or its possession of said sum of $10,060.10; that defendants be required to surrender said policy of insurance to complainant and that

an order and decree of this court to that effect be made and entered herein.

3. That the court allow to complainant a reasonable sum as attorneys' fees incurred in the preparation and prosecution of this action and that such sum so allowed, together with complainant's costs and expenses herein be made a lien upon the moneys deposited herein subject to the order of the court.

4. That this court determine the validity and priority of the respective claims of the defendants herein, and each of them, and direct the disposition of the funds which remain after payment of complainant's costs, expenses and attorneys' fees has been made.

5. That a temporary restraining order and injunction be issued against the defendants, and each of them, restraining and enjoining said defendants, and each of them from taking, [6] maintaining or prosecuting any proceedings in any state or federal court other than this court based upon the claims to moneys heretofore held by complainant by reason of the said life insurance policy and deposited into the registry of this court.

6. That upon the return date specified in said temporary restraining order and injunction the same be made permanent and

7. That complainant have such other and further relief as to this court shall appear meet and proper in the premises.

O'MELVENY & MYERS
And L. M. WRIGHT
Attorneys for Complainant [7]

[Verified.]

[Endorsed]: Filed May 16, 1945. [8]

In the District Court of the United States for the Southern District of California Central Division

No. 4462M Civil

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, a corporation,

Complainant,

vs.

PETER B. HILL; JOANNE HILL, also known as Joan A. Hill; PATRICIA HILL HARDER; VICTOR H. ROSSETTI and FRANK P. DOHERTY, co-executors of the estate of Genevieve Borlini Hill; DOE ONE; DOE TWO; DOE THREE and DOE FOUR,

Defendants.

PERMANENT INJUNCTION AND ORDER FIXING COUNSEL FEES AND COSTS

Complainant's order to show cause why the temporary restraining order herein should not be made permanent and complainant's costs and counsel fees allowed having duly and regularly come on for hearing before the Honorable Paul J. McCormick, Judge of the United States District Court in the courtroom in the Federal Building in the City of Los Angeles, State of California on the 25th day of June, 1945, complainant appearing by Messrs. O'Melveny & Myers and Lauren M. Wright, its counsel, defendants, Peter B. Hill, Joanne Hill, also known as Joan A. Hill, and [9] Patricia Hill Harder appearing by Richard H. Forster, their attorney, and defendants Victor H. Rossetti and Frank P. Doherty, co-executors of

the estate of Genevieve Borlini Hill appearing by Frank P. Doherty and Wm. R. Gallagher, their attorneys. All of the above mentioned defendants appeared voluntarily through their counsel and stipulated that the temporary restraining order herein be made permanent and that counsel fees for complainant's counsel might be fixed in the sum of $250 and complainant's costs be fixed in the amount of $14, and the court being fully advised in the premises and good cause appearing therefor, it is hereby ordered:

1. That the order of injunction heretofore made by this court on May 16, 1945 be and the same hereby is made permanent.

2. That defendants Peter B. Hill, Joanne Hill, also known as Joan A. Hill, Patricia Hill Harder, Victor H. Rossetti and Frank P. Doherty, co-executors of the estate of Genevieve Borlini Hill, Doe One, Doe Two, Doe Three and Doe Four be and each of them is during the pendency of this action and permanently thereafter enjoined and restrained from instituting, commencing or prosecuting or causing to be instituted, commenced or prosecuted any suit, action or proceeding in any court of any state or in any federal court other than the above named court on account of life insurance policy No. 3204489 issued by complainant upon the life of George A. Hill, Jr., or for or on account of any money due or claimed to be due because of said life insurance policy.

3. That attorneys' fees for complainant's counsel are fixed in the amount of $250 and complainant's costs are

fixed in the amount of $14, and the Clerk is hereby ordered to pay over to O'Melveny & Myers and Lauren M. Wright as attorneys for complainant out of the amount heretofore deposited into the court, the [10] said sum of $264.

4. That a copy of this injunction be served upon the named defendants and each of them by the Marshal of the United States District Court.

Dated: June 27th, 1945.

PAUL J. McCORMICK

Judge of the United States District Court, Southern District of California, Central Division.

Approved as to form:

FRANK P. DOHERTY

WM. R. GALLAGHER

By Frank P. Doherty

B.B.

RICHARD H. FORSTER

By Richard H. *Foster*

Judgment entered Jun. 27, 1945. Docketed Jun. 27, 1945, Book 33, page 465. Edmund L. Smith, Clerk; by B. B. Hansen, Deputy.

[Endorsed]: Filed Jun. 27, 1945. [11]

[Title of District Court and Cause.]

ANSWER IN INTERPLEADER ACTION

Defendants, Peter B. Hill, Joanne Hill, also known as Joan A. Hill, and Patricia Hill Harder answer the bill of interpleader herein and allege and admit as follows:

I.

These defendants admit the allegations of the bill of interpleader and consent to and approve the payment into the registry of the court the benefits due under the policy of life insurance referred to therein in the sum of $10,060.10.

II.

On or about December 2nd, 1942, the complainant herein, the Northwestern Mutual Life Insurance Company, for [12] and in consideration of the premiums paid and to be paid by one George A. Hill, Jr., and other considerations, issued to said George A. Hill, Jr., a certain contract of life insurance designated and bearing No. 3204489. By subsequent designation by the insured one Genevieve B. Hill, wife of the insured, was named as direct beneficiary of said policy of insurance. Peter B. Hill, Joanne Hill and Patricia Hill Harder, children, share and share alike, the survivors or survivor, were named contingent beneficiaries of said policy of insurance. On or about November 24, 1944, said George A. Hill, Jr., died and proof of death as required by said insurance policy was duly submitted to complainant. On and after the death of said George A. Hill, Jr., the amount due on said insurance policy was and is $10,060.10.

III.

Said contract of life insurance issued to George A. Hill, Jr., provides in part as follows:

> 11. "Subject to the rights of any Assignee, the Insured (1) may designate one or more Direct Beneficiaries if none be named herein, either with or without reservation of the right to revoke such designation; and (2) may designate one or more Contingent Beneficiaries whose interest shall be as expressed in this policy; and (3) may change any Direct Beneficiary not irrevocably designated and (4) may change any Contingent Beneficiary. If there be more than one Direct Beneficiary the interest of any deceased Direct Beneficiary, including any unpaid benefits due or to become due, shall pass to the surviving Direct Beneficiary or Beneficiaries, unless otherwise directed by the Insured with the consent of the Company. Upon the death of the last surviving [13] Direct Beneficiary the Contingent Beneficiary or Beneficiaries, if any, shall succeed to the interest of such Direct Beneficiary, including any unpaid benefits due or to become due. . . . . ."

IV.

The following provision on the back of the said policy is incorporated as part of said policy contract:

> "Special Provisions Relating to Settlement When This Policy Becomes Payable.
>
> 5. Upon the death of the last surviving Direct Beneficiary the then surviving Contingent Beneficiary or Beneficiaries shall succeed to the remaining benefits otherwise payable to such Direct Bene-Beneficiary, including any unpaid benefits due or to

become due, except that under Option "C" such remainder shall be limited to the stipulated installments then remaining unpaid; and except also that any proceeds then held under Option "A" shall, unless the designator of such surviving Contingent Beneficiary has directed payment under either Option "B", "C" or "D", be paid in one sum (a) immediately in case of any Contingent Beneficiary designated under Special Provisions, paragraph "1a" and (b) if and when, in case of a Contingent Beneficiary designated by the Insured, such proceeds shall have been held under Option "A" for thirty years after the Policy became payable. Where payment of such proceeds under either Option "B", "C" or "D" has been directed in lieu of payment in one sum, such elected option shall thereupon become effective."

V.

The said Direct Beneficiary of said policy of insur- [14] ance, Genevieve B. Hill, died before receiving payment of any of the benefits of said insurance policy and the whole amount due in the sum of $10,060.10 was at the time of her death and now is unpaid.

VI.

Upon the death of said Direct Beneficiary, Genevieve B. Hill, the contingent beneficiaries Peter B. Hill, Joanne Hill, also known as Joan A. Hill, and Patricia Hill Harder, children of said George A. Hill, Jr., who are defendants in this proceeding and all of whom survived the Direct

Beneficiary, succeeded to the interest of said Genevieve B. Hill, including any unpaid benefits due or to become due in accordance with the provisions of the said policy of insurance set forth in paragraph II above.

VII.

The defendants, Peter B. Hill, Joanne Hill, also known as Joan A. Hill, and Patricia Hill Harder, are entitled share and share alike, to all the benefits of the said policy of insurance, to wit, the sum of $10,060.10, heretofore paid into this court by the complainant.

VIII.

The defendants, Victor H. Rossetti and Frank P. Doherty, co-executors of the estate of Genevieve B. Hill have no right or interest in or to the said benefits of the said policy of life insurance, to wit, the sum of $10,060.10.

Wherefore, these defendants pray judgment declaring them to be the owners, share and share alike, of the fund deposited in the registry of the court in this action and requiring the clerk of the court to pay to these defendants, share and share alike, the net remaining proceeds of the said sum of $10,060.10, and for any other and further relief deemed [15] proper by the court.

RICHARD H. FORSTER
Attorney for Defendants

[Verified.]

[Endorsed]: Filed Aug. 6, 1945. [16]

[Title of District Court and Cause.]

ANSWER IN INTERPLEADER ACTION

(of Victor H. Rossetti and Frank P. Doherty, as co-executors of the estate of Genevieve Borlini Hill)

Defendants, Victor H. Rossetti and Frank P. Doherty, co-executors of the estate of Genevieve Borlini Hill, by this their answer to the bill of interpleader herein as well as to the answer of defendants, Peter B. Hill, Joanne Hill, and Patricia Hill Harder, heretofore filed, admit, deny and allege as follows:

I.

Admit the allegations of the bill of interpleader.

II.

Admit the allegations of paragraphs II, III, IV and [17] *and* V of the answer of defendants, Peter B. Hill, Joanne Hill and Patricia Hill Harder.

III.

Allege that during the year 1942 George A. Hill, Jr., the insured under said life insurance policy, was a resident of California, and that negotiations for the issuance of said insurance policy were undertaken and concluded within California, and that said insurance policy was delivered to said insured within California.

IV.

Allege that following the death of said George A. Hill, Jr., the insured under said life insurance policy, proof of death as required by said insurance policy was duly and regularly submitted to and received by complainant a number of days prior to the death of Genevieve B. Hill, the direct beneficiary under said insurance policy, which death of said direct beneficiary occurred on or about January 2, 1945.

V.

Deny each and every allegation of paragraphs VI, VII and VIII of the answer of defendants, Peter B. Hill, Joanne Hill and Patricia Hill Harder, except that it is admitted that Peter B. Hill, Joanne Hill and Patricia Hill Harder were children of George A. Hill, Jr., and survived the direct beneficiary, Genevieve B. Hill.

VI.

That upon the death of said George A. Hill, Jr., the insured under said life insurance policy, the proceeds thereof became due and payable to Genevieve B. Hill, the direct beneficiary thereunder, during her lifetime; and the said Genevieve B. Hill during her lifetime acquired therein a vested interest; [18] that these defendants, as co-executors of the estate of said Genevieve B. Hill, are entitled to all of the benefits of said policy of life insurance, to-wit, the $10,060.10 heretofore paid into Court by the complainant; that defendants, Peter B. Hill, Joanne Hill and Patricia Hill Harder have no right or interest in or to the proceeds or benefits of said policy of life insurance.

Wherefore, these defendants pray judgment declaring them as such co-executors to be the owners of the fund deposited in the registry of the Court in this action, and requiring the clerk of the Court to pay to these defendants, as such co-executors, the net remaining proceeds of said fund, and for such other and further relief as may be deemed proper by the Court.

LAWLER, FELIX & HALL
By John M. Hall
Attorneys for Defendants, Victor H. Rossetti and Frank P. Doherty, co-executors of the estate of Genevieve Borlini Hill.

[Endorsed]: Filed Aug. 7, 1945. [19]

[Title of District Court and Cause.]

CONCLUSIONS OF THE COURT

This is an interpleader action relating to a policy of term life insurance issued by plaintiff company to George A. Hill, Jr., wherein one "Genevieve B. Hill, wife," was named by the insured as direct beneficiary of such policy. The contract of insurance also provided for contingent beneficiaries, and the insured named as such "Peter B. Hill, Joanne Hill, and Patricia Hill Harder, children, share & share alike, the survivors or survivor." Conflicting bona fide claims have been made by the executors of Genevieve B. Hill, deceased, and the designated Hill children to the insurance due under the policy by reason of the death of the insured, and the demise of Mrs. Hill approximately six weeks later, and before any benefits payable under the policy in suit had been made.

In order to avoid a multiplicity of suits on a single liability with the attendant consequences the plaintiff has deposited in the registry $10,060.10, conceded by all parties to be the amount due under the policy to be paid in [39] settlement of the policy, No. 3204489, to such parties as the court should determine to be entitled to payment.

There can be no jurisdictional question in the action. Moreover, none is raised by any of the parties.

The question for decision is whether the proceeds of the policy should go to the widow's estate or to the contingent beneficiaries, namely, the children of the insured by a former marriage.

The contract of insurance under consideration was negotiated for and delivered in the State of California. Under such facts the policy must be interpreted and the

rights of the claimants to the benefits due or to become due under the terms of the policy will be governed by the law of the State of California. Mutual Life Co. v. Johnson, 293 U. S. 335; Ruhlin v. New York Life Ins. Co., 304 U. S. 202; Rosenthal v. New York Life Ins. Co., 304 U. S. 263.

The terms and provisions of the policy in suit constitute the measuring rod or denominator by which the court is to determine the rightful claimant to the amount now on deposit in the registry. See Section 10111, Insurance Code of the State of California.

The court must ascertain the intention of the insured gleaned from all parts of the policy read as a whole and reasonably and normally considered without any material alteration of the writing. If then the policy is clear in expressing the intention of the insured as to whom and in what manner persons designated by him shall succeed to the benefits of the policy, the court is bound to effectuate the insured's expressed purpose by deciding the case accordingly. Northwestern Mutual Life Ins. Co. v. Fink, (C. C. A. 6, 1941), 118 F. 2d 761. [40]

Preliminarily to examining the policy the undisputed facts of the case should be stated. They are as follows: Under date of December 2, 1942 the Northwestern Mutual Life Insurance Company duly issued its policy for $10,000.00 on the life of George A. Hill, Jr. The policy gave the insured the right to change beneficiaries and also provided for the right of the insured to designate both direct and contingent beneficiaries at his option and choice. The policy when issued to Mr. Hill contained the designation of "his children Peter B., Joanne, and Patricia Hill, the direct beneficiaries, share and share alike, the survivors or survivor." There was no other beneficiary

named in the policy at the initial issuance of it. Subsequently, under date of January 26, 1944, Mr. Hill changed the direct beneficiary from his children to "Genevieve B. Hill, wife," and under the same date designated as contingent beneficiaries "Peter B. Hill, Joanne Hill and Patricia Hill Harder, children, share and share alike, the survivors or survivor." Hill, the insured, died on November 24, 1944. Due proof of his death was submitted to and received by the plaintiff insurance company. Thereafter, on January 2, 1945, the widow, Genevieve B. Hill, direct beneficiary, died without having made any election under paragraph 1a of the "special provisions" set out in the policy. This paragraph which follows another, whereby the insured is given the right before the policy becomes payable to elect payment of the then net proceeds under options specified in the policy, read:

"Privileges of Direct Beneficiary. 1a. If when this Policy becomes payable no such election by the Insured is then in force, the Direct Beneficiary or Beneficiaries may make such election in lieu of payment in one sum and upon such an election by the Direct Beneficiary or Beneficiaries the interest of any Contingent Beneficiary designated by the Insured shall terminate. The Direct Beneficiary or Beneficiaries may then, subject to change, designate a Contingent Beneficiary or Beneficiaries under the election so made." [41]

The executors of Mrs. Hill's estate earnestly argue that parts of the policy, including paragraph 1a, which are specified under the caption "Special provisions relating to settlement when this policy becomes payable", have no application to the situation presented in this case. We cannot agree with such contention.

It is obvious that the policy matures and therefore "becomes payable" upon the death of the insured. However the payments are to be made to such beneficiaries and in such manner as to carry out the intention of the insured as expressed in the policy under consideration. Paragraph 1a provides ways by which "the interest of any contingent beneficiary designated by the insured shall terminate." These quoted words connote an interest of the contingent beneficiaries, i. e., the children of the insured after the death of the insured under the situation which the undisputed evidence in this action discloses.

But the interest of the "Hill children" in the benefits of the policy due or to become due upon the death of the insured is not to be determined solely from the "Special provisions relating to settlement when this policy becomes payable."

To more certainly evaluate the meaning of the policy in suit as it pertains to those named therein as beneficiaries, consideration should be given to the insured's natural propensity to financially provide for and protect his widow during her lifetime, and, next, his own children, rather than her relations or creditors. He unmistakably manifested this attitude by primarily naming his children as sole beneficiaries of the policy, and upon realizing later conjugal obligations, substituting his wife as direct beneficiary but still regardful of his children's welfare also, he [42] simultaneously named them contingent beneficiaries.

But we are not left to inferences from the policy in concluding that the intention of the insured was to confine all unpaid benefits of the insurance contract to his wife firstly, and to his children if it became impossible because of her death for her to receive any such benefits. The

clearly expressed terms of the policy warrant no other conclusion.

Paragraph 11 of the "General Provisions" of the policy is a lengthy statement which relates to and deals with several distinct features of the contract of insurance in controversy and is for convenient reference in the memorandum filed by the executors of the estate of Genevieve B. Hill restated as Sentences (A), (B), (C), (D) and (E). The executors contend that the entire Paragraph 11 must be deemed to refer to a period ending with the insured's death—not to a period after the insured's death. We think such contention untenable upon analysis of the several subject matters contained in Paragraph 11. We are also of the opinion that all the sentences in Paragraph 11 have no necessary contextual meaning.

Sentence (E) has no application to the situation before us in this action and may be left out of consideration as immaterial. Sentence (A) is material here only in that it provides in "(2)" that the interest of contingent beneficiaries shall be as expressed in the policy. Sentences (B), (C) and (D) all relate to payments of benefits, but each of such sentences deals with specific and separate actualities. (B) is immaterial to this controversy as there is only one direct beneficiary in the policy in suit. Likewise (D) is of no effect in this action, but Sentence (C) is not only applicable to the situation before us, but clearly and [43] conclusively determines the right of the "Hill Children" to the unpaid benefits of the policy now in the registry of the court.

So-called Sentence (C) of the policy in suit is as follows:

> "(C) Upon the death of the last surviving Direct Beneficiary the Contingent Beneficiary or Beneficiaries, if any, shall succeed to the interest of such Direct Beneficiary, including any unpaid benefits due or to become due."

It is clear that this requirement reads directly and unequivocally upon the admitted and established situation before us in this action. Mrs. Hill was the last surviving direct beneficiary, and not having received during her lifetime the unpaid benefits due under the policy, the contingent beneficiaries, to-wit, the three "Hill Children" succeed to the unpaid benefits of the policy, which is the money remaining in the registry in this action.

There is nothing in any part of the policy in suit which can militate against our conclusion as to the decisive effect of Sentence (C) upon the situation before us in this action. On the contrary, the provisions of Paragraph 5 of the "Special Provisions Relating to Settlement when this Policy becomes Payable" are substantially identical with Sentence (C) of Paragraph 11 of the "General Provisions" of the policy and strengthen the accuracy of our conclusions in this case.

We think that under the terms and provisions of the policy in suit and in the light of the admitted facts and circumstances in proof in this action, the contingent beneficiaries and not the testamentary representatives of the deceased person who in her lifetime was the direct benefi- [44] ciary in the contract of insurance are entitled share

and share alike to an award of the money deposited by the plaintiff insurance company in satisfaction of Policy No. 3204489 of the Northwestern Mutual Life Insurance Company.

The rights of the direct beneficiary upon the death of the insured are not to be ascertained or determined by fixed abstract rules which are not applicable to the factual situation before the court in the consideration of the specific contractual obligation in controversy, and for that reason many of the authorities cited in the memorandum of the executors have no application in the case at bar.

Findings of fact, conclusions of law and judgment for the amount now in the registry of this court, to-wit, $9796.10, less any actually accrued costs of the Clerk, are ordered for the defendants Peter B. Hill, Joanne Hill, also known as Joan A. Hill, and Patricia Hill Harder, and against Victor H. Rossetti and Frank P. Doherty, co-executors of the estate of Genevieve Borlini Hill, deceased, with costs of suit to said "Hill children." Attorneys for defendants "Hill children" will prepare, serve and present within five days from notice of this ruling, findings of fact, conclusions of law and judgment in accordance with the views expressed in these written conclusions of the court.

Dated November 13, 1945.

PAUL J. McCORMICK
United States District Judge.

[Endorsed]: Filed Nov. 13, 1945. [45]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on for trial before this court, sitting without a jury, on October 2nd, 1945. The complainant, The Northwestern Mutual Life Insurance Company, a corporation, represented by its attorneys, O'Melveny & Myers, having brought the interpleader action and having deposited in the registry of the court the sum of $10,060.10, which was the amount due under the policy, hereinafter referred to, had been released from the case prior to the trial. Defendants, Peter B. Hill, Joanne Hill, also known as Joan A. Hill and Patricia Hill Harder, were represented by their attorneys, Richard H. Forster and Chauncey E. Snow. The defendants, Victor H. Rossetti and Frank P. Doherty, co-executors [46] of the estate of Genevieve Borlini Hill, deceased, were represented by their attorneys, Lawler, Felix and Hall.

The court having heard the evidence and considered the
and having filed herein written conclusions of
the court, now [P.J.M. J.]
stipulation of the parties ^ finds the facts and states the conclusions of law as follows:

FINDINGS OF FACT

1. The complainant, The Northwestern Mutual Life Insurance Company, a corporation organized and existing under the laws of the State of Wisconsin, is a citizen of that state. The defendants, Victor H. Rossetti and Frank P. Doherty, are the duly qualified and acting co-executors of the estate of Genevieve Borlini Hill, now being probated in the County of Los Angeles, State of California, bearing Superior Court No. 239479. The

defendants, Peter B. Hill, Joanne Hill, also known as Joan A. Hill, and Patricia Hill Harder, are now and were at all times covered by these findings, residents in and citizens of the State of California.

2. The amount involved in this cause of action is the sum of $10,060.10.

3. On or about December 2nd, 1942, the complainant in consideration of the premiums paid and to be paid by one George A. Hill, Jr., and other considerations, issued to said George A. Hill, Jr. a certain contract of life insurance designated and bearing No. 3204489, for $10,000.00. The policy when issued to Mr. Hill contained the designation of "his children, Peter B. Hill, Joanne Hill and Patricia Hill, the direct beneficiaries, share and share alike, the survivors or survivor". There was no other beneficiary named in the policy at the initial issuance of it. The policy gave the insured the right to change beneficiaries and also provided for the right of the insured to designate both direct and contingent beneficiaries, at his option and choice. Subsequently, under date [47] of January 26th, 1944, Mr. Hill, the insured, changed the direct beneficiary from his children to "Genevieve B. Hill, wife" and under the same date designated as contingent beneficiaries, "Peter B. Hill, Joanne Hill and Patricia Hill Harder, children, share and share alike, the survivors or survivor".

4. Mr. Hill, the insured, died on November 24th, 1944. Due proof of his death was submitted to and received by the complainant insurance company. Thereafter, on January 2, 1945, the widow, Genevieve B. Hill, direct beneficiary, died without having made any election under paragraph 1a of the "special provisions" set out in the policy. This paragraph which follows another,

whereby the insured is given the right before the policy becomes payable to elect payment of the then net proceeds under options specified in the policy, read:

"Privileges of Direct Beneficiary.

1a. If when this Policy becomes payable no such election by the Insured is then in force, the Direct Beneficiary or Beneficiaries may make such election in lieu of payment in one sum and upon such an election by the Direct Beneficiary or Beneficiaries the interest of any Contingent Beneficiary designated by the Insured shall terminate. The Direct Beneficiary or Beneficiaries may then, subject to change, designate a Contingent Beneficiary or Beneficiaries under the election so made."

5. Section 11 of the said policy provides as follows:

11. "Subject to the rights of any Assignee, the Insured (1) may designate one or more Direct Beneficiaries if none be named herein, either with or without reservation of the right to revoke such designation; and (2) may designate one or more Contingent Beneficiaries whose interest shall be as expressed in this policy; and (3) may change any Direct Beneficiary not irrevocably designated; and (4) [48] may change any Contingent Beneficiary. If there be more than one Direct Beneficiary the interest of any deceased Direct Beneficiary, including any unpaid benefits due or to become due, shall pass to the surviving Direct Beneficiary or Beneficiaries, unless otherwise directed by the Insured with the consent of the Company. Upon the death of the last surviving Direct Beneficiary the Contingent Beneficiary or Beneficiaries, if any, shall succeed to

the interest of such Direct Beneficiary, including any unpaid benefits due or to become due. If no Direct Beneficiary or Contingent Beneficiary survives the Insured the proceeds of this policy shall be payable to the executors, administrators or assigns of the Insured. No such designation, revocation, change or direction shall be effective unless duly made in writing and filed at the Home Office of the Company (accompanied by this Policy prior to or at the time this Policy shall become payable, and endorsed thereon by the Company."

6. Paragraph 5 of "Special Provisions Relating to Settlement When This Policy Becomes Payable", on said policy provides as follows:

5. "Upon the death of the last surviving Direct Beneficiary the then surviving Contingent Beneficiary or Beneficiaries shall succeed to the remaining benefits otherwise payable to such Direct Beneficiary, including any unpaid benefits due or to become due, except that under Option "C" such remainder shall be limited to the stipulated installments then remaining unpaid; and except also that any proceeds then held under Option "A" shall, unless the designator of such surviving Contingent Beneficiary has directed payment under either Option "B", "C" or "D", be paid in one sum (a) immediately in case of any [49] Contingent Beneficiary designated under Special Provisions, paragraph "1a" and (b) if and when, in case of a Contingent Beneficiary designated by the

Insured, such proceeds shall have been held under Option "A" for thirty years after the policy became payable. Where payment of such proceeds under either Option "B", "C" or "D" has been directed in lieu of payment in one sum, such elected option shall thereupon become effective."

7. It is the meanings of the said policy gathered from its whole contents that if the wife named as Direct Beneficiary should survive the insured but should die before receiving the benefits due or to become due under the policy, that all such unpaid benefits due or to become due should be paid to the said three children of the insured or to the survivor or survivors of them equally. It was the intention of Mr. Hill, the insured, as indicated by the provisions of the said policy and the surrounding circumstances under which the policy was issued and the surrounding circumstances at the time of the said change of Direct Beneficiary and the designation of the said three children as Contingent Beneficiaries to financially provide for and protect his widow during her life time and next his own children, rather than the creditors, heirs or legatees of the estate of his widow if she should survive the insured and then die before receiving the benefits due or to become due under the said policy.

8. The court has heretofore allowed to the complainant as fees for its attorneys the sum of $250.00 and as costs the sum of $14.00, which amount has been paid out from the registry of this court, leaving a balance of $9,796.10.

CONCLUSIONS OF LAW

1. That the defendants, Peter B. Hill, Joanne Hill, also known as Joan A. Hill, and Patricia Hill Harder, are [50] entitled to the proceeds of the said policy now in the registry of the court in the sum of $9,796.10.

2. That the defendants, Victor H. Rossetti and Frank P. Doherty, as co-executors of the estate of Genevieve Borlini Hill, are not entitled to any of the proceeds of the said policy now in the registry of the court.

3. That the claim of the defendants, Peter B. Hill, Joanne Hill, also known as Joan A. Hill, and Patricia Hill Harder, as set forth in their answer in this cause should be granted.

4. That the claim of the defendants, Victor H. Rossetti and Frank P. Doherty, co-executors of the estate of Genevieve Borlini Hill, should not be granted.

5. That the defendants, Peter B. Hill, Joanne Hill, also known as Joan A. Hill, and Patricia Hill Harder, should receive their costs of suit against the defendants, Victor H. Rossetti and Frank P. Doherty, co-executors of the estate of Genevieve Borlini Hill.

It Is So Ordered:

Attorneys for defendants, Peter B. Hill, Joanne Hill, also known as Joan A. Hill, and Patricia Hill Harder, will submit appropriate judgment in accordance herewith.

Dated: November 26th, 1945.

PAUL J. McCORMICK
United States District Judge.

[Endorsed]: Filed Nov. 26, 1945. [51]

In the District Court of the United States for the Southern District of California
Central Division

No. 4462-M Civil

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, a corporation,

Complainant,

vs.

PETER B. HILL; JOANNE HILL, also known as Joan A. Hill; PATRICIA HILL HARDER; VICTOR H. ROSSETTI and FRANK P. DOHERTY, co-executors of the Estate of Genevieve Borlini Hill; DOE ONE; DOE TWO; DOE THREE and DOE FOUR,

Defendants.

JUDGMENT

This cause came on for trial before this court, sitting without a jury, on October 2nd, 1945. The complainant, The Northwestern Mutual Life Insurance Company, a corporation, represented by its attorneys, O'Melveny & Myers, having brought the interpleader action and having deposited in the registry of the court the sum of $10,060.10, which was the amount due under the policy, hereinafter referred to, had been released from the case prior to the trial. Defendants, Peter B. Hill, Joanne Hill, also known as Joan A. Hill and Patricia Hill Harder, were represented by their attorneys, Richard H. Forster and Chauncey E. Snow. The defendants, Victor H. Ros-

setti and Frank P. Doherty, co-executors [52] of the estate of Genevieve Borlini Hill, deceased, were represented by their attorneys, Lawler, Felix and Hall.

The court having filed its findings of fact and having made its conclusions of law,

It Is Hereby Ordered, Adjudged and Decreed as Follows:

1. That the defendants, Peter *P*. Hill, Joanne Hill, also known as Joan A. Hill, and Patricia Hill Harder, receive the balance of the proceeds of the policy of life insurance in the sum of $9,796.10 now in the registry of this court, equally.

2. That the clerk of this court pay to the said defendants the said sum upon payment to him of his actually acc*ur*ed costs.

3. That the defendants, Peter B. Hill, Joanne Hill, also known as Joan A. Hill, and Patricia Hill Harder, have their costs of suit against the defendants, Victor H. Rossetti and Frank P. Doherty, co-executors of the estate of Genevieve Borlini Hill.

4. Said costs of suit are hereby taxe*s* at $....................

Dated: November 26th, 1945.

PAUL J. McCORMICK
United States District Judge.

Judgment entered Nov. 26, 1945. Docketed Nov. 26, 1945, C. O. Book 35, page 721. Edmund L. Smith, Clerk; by J. M. Horn, Deputy.

[Endorsed]: Filed Nov. 26, 1945. [53]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT UNDER RULE 73(b)

Notice Is Hereby Given that defendants, Victor H. Rossetti and Frank P. Doherty, co-executors of the estate of Genevieve Borlini Hill, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on November 26, 1945.

Dated December 29, 1945.

LAWLER, FELIX & HALL
By John M. Hall

Attorneys for Defendants, Victor H. Rossetti and Frank P. Doherty, co-executors of the estate of Genevieve Borlini Hill.

[Endorsed]: Filed & mailed copy to O'Melveny & Myers, Attys. for plf. and Richard H. Forster & Chauncey E. Snow, Attys. for defts. Hill et al. Dec. 29, 1945. [54]

[Title of District Court and Cause.]

SUPERSEDEAS UNDERTAKING
(under Rule 73d)

Know All Men By These Presents:

That the undersigned, Maryland Casualty Company, a corporation organized and existing under and by virtue of the laws of the State of Maryland, and duly licensed to transact a general surety business in the State of California, is held and firmly bound unto defendants, Peter B. Hill, Joanne Hill, also known as Joan A. Hill, and Patricia Hill Harder, in the full and just sum of Two Thousand Dollars ($2,000.00) to be paid to the said defen- [55] dants, their attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, the undersigned binds itself, and its successors, by these presents.

Sealed with our seal and dated this 28th day of December, 1945.

Whereas, lately at a District Court of the United States for the Southern District of California, Central Division, in a suit pending in said Court between The Northwestern Mutual Life Insurance Company, a corporation, complainant, and Peter B. Hill, Joanne Hill, also known as Joan A. Hill, Patricia Hill Harder, Victor H. Rossetti and Frank P. Doherty, co-executors of the estate of Genevieve Borlini Hill, defendants, No. 4462-M, a judgment was rendered wherein and whereby it was ordered, adjudged and decreed that defendants, Peter B. Hill, Joanne Hill, also known as Joan A. Hill, and Patricia Hill Harder, receive the balance of the proceeds of a certain policy of life insurance in the sum of $9,796.10 now in the registry of this Court, and that the Clerk of this

Court pay to said defendants the said sum upon payment to him of his actually accrued costs, and that said defendants have their costs of suit against defendants, Victor H. Rossetti and Frank P. Doherty, as such co-executors; and

Whereas, said defendants, Victor H. Rossetti and Frank P. Doherty, as such co-executors, have filed in said Court a notice of appeal to reverse said judgment in the aforesaid suit on appeal to the United States Circuit Court of Appeals for the Ninth Circuit at a session of said Circuit Court of Appeals to be holden in the State of California;

Now, the condition of the above obligation is such, that if the said Victor H. Rossetti and Frank P. Doherty, as such co-executors, shall prosecute said appeal to effect and satisfy in full [56] any amount finally awarded said defendants, Peter B. Hill, Joanne Hill, also known as Joan A. Hill, and Patricia Hill Harder in excess of said sum of $9,796.10 now in the registry of the Court, as aforesaid, on account of said judgment or any modification thereof, and on account of the detention of said $9,796.10, the costs of the action, costs on appeal and interest, then the above obligation shall be void, but otherwise shall remain in full force and effect.

(Corporate Seal)

MARYLAND CASUALTY COMPANY

By Frances Gray

Attorney-in-Fact

Address: Banks-Huntley Bldg.
634 S. Spring St.,
Los Angeles 14,
California.

State of California, County of Los Angeles—ss.

On this 28th day of December in the year one thousand nine hundred and Forty-Five, before me L. W. Sudmeier, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared Frances Gray, known to me to be the duly authorized Attorney-in-Fact of Maryland Casualty Company, and the same person whose name is subscribed to the within instrument as the Attorney-in-Fact of said Corporation, and the said Frances Gray acknowledged to me that he subscribed the name of the Maryland Casualty Company as Surety, and his own name as Attorney-in-Fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

(Notarial Seal) L. W. SUDMEIER

Notary Public in and for Said County and State.

My Commission Expires April 11, 1948.

Examined and Recommended for approval as provided in Rule 8.

JOHN M. HALL

Attorney for Defendants, Victor H. Rossetti and Frank P. Doherty, co-executors of the estate of Genevieve Borlini Hill, Deceased.

Approved as to form and amount.

CHAUNCEY E. SNOW

Attorneys for Defendants, Peter B. Hill, Joanne Hill, also known as Joan A. Hill, and Patricia Hill Harder.

I hereby approve the foregoing.

Dated this 29th day of Dec., 1945.

PAUL J. McCORMICK

Judge of the United States District Court.

[Endorsed]: Filed Dec. 29, 1945. [57]

[Title of District Court and Cause.]

ORDER STAYING EXECUTION UPON APPEAL (under Rule 62d)

Defendants, Victor H. Rossetti and Frank P. Doherty, co-executors of the estate of Genevieve Borlini Hill, having heretofore filed their notice of appeal from the judgment herein which was entered on November 26, 1945, and having heretofore filed a supersedeas undertaking pursuant to Rule 73d, which undertaking has been approved.

It Is Ordered that execution of said judgment shall be stayed and that the $9,796.10 now in the registry of this Court in this cause shall remain in said registry during the pendency of said appeal.

Dated December 29th, 1945.

PAUL J. McCORMICK

Judge of the United States District Court

[Endorsed]: Filed Dec. 29, 1945. [58]

In the District Court of the United States for the Southern District of California, Central Division

No. 4462M Civil

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, a corporation,

Complainant,

v.

PETER B. HILL, JOANNE HILL, also known as JOAN A. HILL, PATRICIA HILL HARDER, VICTOR H. ROSSETTI and FRANK P. DOHERTY, co-executors of the estate of Genevieve Borlini Hill, DOE ONE, DOE TWO, DOE THREE and DOE FOUR,

Defendants.

STIPULATION DESIGNATING CONTENTS OF RECORD ON APPEAL UNDER RULE 75(f).

It Is Hereby Stipulated by the parties hereto, by their respective counsel undersigned, that the following parts of the record, proceedings, and evidence shall be included in the record on appeal:

1. Bill of Interpleader.

2. Permanent Injunction and Order Fixing Counsel Fees and Costs.

3. Answer in Interpleader Action (of Victor H. Rossetti and Frank P. Doherty, [62] as co-executors of the estate of Genevieve Borlini Hill).

4. Answer in Interpleader Action (of Peter B. Hill, Joanne Hill and Patricia Hill Harder).

5. Entire Stenographic Report of Trial Proceedings on October 2, 1945 (the same being all of the proceedings and evidence taken at the trial, and the only matter excluded being the oral argument at the trial).

6. Copy of Policy No. 3204489 of The Northwestern Mutual Life Insurance Company referred to in said Stenographic Report and received in evidence at the trial as Defendants' Exhibit A.

7. Conclusions of the Court (dated November 13, 1945).

8. Findings of Fact and Conclusions of Law, together with direction for entry of judgment thereon.

9. Judgment.

10. Notice of Appeal to United States Circuit Court of Appeals for the Ninth Circuit Under Rule 73(b).

11. Supersedeas Undertaking (under Rule 73d).

12. Order Staying Execution Upon Appeal (under Rule 62d).

13. Stipulation Designating Contents of Record on Appeal under Rule 75(f).

14. Concise Statement of Points on Which Appellants Intend to Rely on Appeal. [63]

It Is Further Stipulated by the parties hereto, by their respective counsel undersigned, that the

facts referred to in the Stenographic Report of Trial Proceedings (item 5 above) as having been set forth in a printed memorandum and being undisputed at the trial were and are the following:

"December 2, 1942, Northwestern Mutual Life Insurance Company issued a term life insurance policy for $10,000.00 on the life of George A. Hill, Jr. Hill was then a resident of California. Negotiations for and delivery of this policy occurred in California. The policy gave the insured the right to change the beneficiary. Early in 1944, Hill, the insured, named his wife, Genevieve B. Hill, as the 'direct beneficiary' under the policy, and his children, Peter B. Hill, Joanne Hill and Patricia Hill Harder, as 'contingent beneficiary'. Hill, the insured, died on November 24, 1944. Due proof of his death was submitted to and received by the insurance company. Thereafter, on January 2, 1945, the widow Genevieve B. Hill, died."

"The amount due on the policy is admitted to be $10,060.10 and claim thereto has been made (1) by Victor H. Rossetti and Frank P. Doherty, executors of the widow's estate, and (2) by the children. The insurance company joined these parties as defendants in its bill of interpleader and has paid the $10,060.10 into the registry of this Court."

and that such facts were and are true, except that the amount now in the registry of the Court is $9,796.10, as stated in the judgment, there having been deducted and paid from said fund of $10,060.10 by order of the Court, complainant's at-

torneys' fees [64] in the sum of $250.00 and complainant's costs in the sum of $14.00, as stated in the Court's findings.

Dated January 2, 1946.

O'MELVENY & MYERS
By L. M. WRIGHT
Attorneys for complainant.

RICHARD H. FORSTER
CHAUNCEY E. SNOW
By CHAUNCEY E. SNOW
Attorneys for defendants and respondents, Peter B. Hill, Joanne Hill and Patricia Hill Harder.

LAWLER, FELIX & HALL
By JOHN M. HALL
Attorneys for defendants and appellants, Victor H. Rossetti and Frank P. Doherty, co-executors of the estate of Genevieve Borlini Hill, deceased.

[Endorsed]: Filed Jan. 4, 1946. [65]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 65 inclusive contain full, true and correct copies of Bill of Interpleader; Permanent Injunction and Order Fixing Counsel Fees and Costs; Answer in Interpleader Action of Peter

B. Hill et al.; Answer in Interpleader Action of Victor H. Rossetti and Frank P. Doherty, as co-executors of the estate of Genevieve Borlini Hill; Reporter's Transcript of Proceedings held October 2, 1945; Policy No. 3204489 of the Northwestern Mutual Life Insurance Company; Conclusions of the Court; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Supersedeas Undertaking Order Staying Execution Upon Appeal; Concise Statement of Points on Which Appellants Intend to Rely on Appeal and Stipulation Designating Contents of Record on Appeal which constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to $6.85 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 15 day of January, 1946.

[Seal] EDMUND L. SMITH,
Clerk,

By THEODORE HOCKE
Chief Deputy Clerk

[Title of District Court and Cause.]

Honorable Paul J. McCormick, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California
Tuesday, October 2, 1945

Appearances:

For the Defendants Peter B. Hill, Joanne Hill, and Patricia Hill Harder: Richard H. Forster, Esq., 530 West Sixth Street, Los Angeles, California, and Chauncey E. Snow, Esq., 530 West Sixth Street, Los Angeles, California.

For the Defendants Victor H. Rossetti, and Frank P. Doherty, Co-Executors of the Estate of Genevieve Borlini Hill, Deceased: Lawler, Felix & Hall, by John M. Hall, Esq., 800 Standard Oil Building, Los Angeles, California. [1*]

Los Angeles, California, Tuesday, October 2, 1945.
10 A. M.

The Clerk: No. 4462-Civil, The Northwestern Mutual Life Insurance Company v. Peter B. Hill, et al.

Mr. Hall: Ready for the defendant executors.

Mr. Forster: Ready for the Hill children.

The Court: Proceed, gentlemen.

Mr. Forster: Your Honor, I would like to associate Chauncey Snow with me on behalf of the three Hill children who are the contingent beneficiaries.

*Page numbering appearing at top of page of original Reporter's Transcript.

The Court: So ordered. I have read the so-called pretrial memoranda and I have read the pleadings. Proceed.

Mr. Hall: I believe, your Honor, that the only evidence to be produced this morning is to introduce a copy of the insurance policy.

In my printed memorandum I set out certain facts and those facts have not been disputed. Mr. Snow made reference to one additional fact which I will let him call attention to, and which I am ready to stipulate to. That leaves nothing further in the way of evidence except to place before your Honor the insurance policy. Mr. Wright, representing the complainant, is here with a copy of the policy to be put in evidence.

Have you seen this, Mr. Snow?

Mr. Snow: Yes. That comes upon Mr. Wright's suggestion. [2]

Mr. Hall: This copy of the policy, which is No. 3204489, does not contain the original applications of the insured for the policy, which were attached to the original policy. However, I think Mr. Snow will agree that those particular applications have no bearing upon our controversy.

Mr. Snow: It is so agreed.

Mr. Hall: I offer in evidence the copy of the policy.

The Court: I will be received.

The Clerk: That will be Defendants' Exhibit A.

(The document referred to was marked as Defendants' Exhibit A, and was received in evidence.)

[DEFENDANTS' EXHIBIT A]

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY
of Milwaukee, Wisconsin

[Crest]

No. 3204489
Age 49

In Consideration of the payment of a Premium of Forty-Eight and 50/100 Dollars, the receipt of which is hereby acknowledged, and of the payment of a like sum on or before the 2nd day of December, March, June and September in every year for five years from the date of this Policy or until the prior death of

GEORGE A. HILL, JR.

of San Marino, California (hereinafter called the Insured), and immediately upon receipt of due proof of the death of the Insured, if such death shall occur within said five years, The Northwestern Mutual Life Insurance Company (hereinafter called the Company), promises to pay at its Home Office the sum of Ten Thousand Dollars, less any unpaid premium or premiums to the end of the current policy year, to His Children, Peter B., Joanne and Patricia Hill, the Direct Beneficiaries, Share and Share Alike, the Survivors or Survivor, with reservation to the Insured of the right of revocation and change of Direct Beneficiary.

This Policy is issued by the Company and accepted by the parties in interest subject to the provisions stated on the consecutively numbered pages hereof which are hereby made a part of this contract.

(Defendants' Exhibit A)

In Witness Whereof the Company has caused this Policy to be executed at Milwaukee, Wisconsin, this 2nd day of December, 1942.

G. L. Anderson
Secretary

[Illegible]
President

Attest: [Illegible]
Registrar

DD. 7.

Non-Renewable

FIVE YEAR TERM POLICY

(Convertible Within Five Years)

Premiums Payable for Five Years or Until Prior Death of Insured

Dividends Payable Annually

[Page 2]

ENDORSEMENTS

Note—No designation, revocation or change of Beneficiary; and no election, direction, revocation or change under the Special Provisions Relating to Settlement, shall be effective unless made in writing, filed with the Company and endorsed as hereinafter provided.

The provisions of the two supplements dated January 26, 1944, attached hereto are made a part of this policy.

[Illegible]
Registrar

February 7, 1944
MF/K

(Defendants' Exhibit A)

[Page 3]

GENERAL PROVISIONS

Policy and Application Entire Contract. 1. This Policy and the application therefor (a copy of which is attached hereto) constitute the entire contract between the parties. All statements made by the Insured in applying for this Policy shall, in the absence of fraud, be deemed representations and not warranties, and no statement by or on behalf of the Insured shall avoid this Policy or be used in defense of a claim hereunder unless it is contained in the said application and a copy thereof is attached to this Policy when issued.

Agents. 2. No agent of the Company is authorized to waive forfeitures or to make, alter or discharge contracts, or to extend the time for payment of premium.

Reserve. 3. The reserve on this Policy shall be in accordance with the American Experience Table of Mortality with interest at three per cent.

Suicide. 4. If within two years from the date hereof the Insured shall died by his or her own hand, whether sane or insane, the liability of the Company under this Policy shall be limited to the amount of the reserve hereon.

Incontestability. 5. Except for non-payment of premium this Policy shall be incontestable after it has been in force during the life time of the Insured for a period of two years from its date of issue. If the age of the Insured has been misstated the amount payable hereunder shall be such as the premium paid would have purchased at the correct age.

Premium Payments. 6. All premiums shall be payable in advance at the Home Office of the Company in Milwaukee, Wis-

(Defendants' Exhibit A)

consin, or to an authorized agent upon delivery of a receipt signed by the President or Secretary of the Company and countersigned by such agent. The insurance under this Policy is based upon annual preumiums but payment may be made on a semi-annual or a quarterly basis at the published rates now in use by the Company. Change will be made upon suitable request on any anniversary of the date hereof. Upon default in the payment of any premium this Policy shall cease and determine except as hereinafter provided.

Grace. 7. If any premium is not paid on or before the day it is due the Policy is in default; but a grace period of thirty-one days, during which period the insurance will continue in full force, shall be allowed for the payment of every premium except the first.

Reinstatement. 8. In event of non-payment of premium when due or within the grace period this Policy may be reinstated at any time within three years succeeding default in premium payment, but not later than five years from its date, upon evidence satisfactory to the Company of the insurability of the Insured and payment of all past due premiums with interest from the due date or dates at the rate of five per cent. per annum.

Dividend Options. 9. This Policy while in force shall participate annually in the divisible surplus of the Company. The Company will annually determine the dividend of such surplus equitably apportionable hereto but payment of the first dividend shall be contingent upon and proportionate to the premium or premiums due and paid for the second policy year. At the option of the Insured any dividend of surplus payable may be: (a)

(Defendants' Exhibit A)

paid in cash; (b) applied towards the payment of premium hereon; (c) left to accumulate while this Policy is in force with interest credited annually at such rate, not less than 2½ per cent., as may be determined by the Company, and subject to withdrawal in cash at any time or payment with the proceeds of the Policy. If this Policy shall become payable by the death of the Insured any annual dividend otherwise payable at the end of the policy year will be paid with the proceeds of the Policy. Unless the Insured shall otherwise elect in writing dividends will be paid in cash.

st Mortem Dividend.

ignments.

10. No assignment of this Policy shall be binding upon the Company until filed with the Company at its Home Office. The Company will assume no responsibility for the validity or effect of any assignment.

Direct and Contingent neficiaries.

11. Subject to the rights of any Assignee, the Insured (1) may designate one or more Direct Beneficiaries if none be named herein, either with or without reservation of the right to revoke such designation; and (2) may designate one or more Contingent Beneficiaries whose interest shall be as expressed in this Policy; and (3) may change any Direct Beneficiary not irrevocably designated; and (4) may change any Contingent Beneficiary. If there be more than one Direct Beneficiary the interest of any deceased Direct Beneficiary, including any unpaid benefits due or to become due, shall pass to the surviving Direct Beneficiary or Beneficiaries unless otherwise directed by the Insured with the consent of the Company. Upon the death of the last surviving Direct Beneficiary the Contingent Bene-

(Defendants' Exhibit A)

Designations, Revocations, Changes, Etc.

ficiary or Beneficiaries, if any, shall succeed to the interest of such Direct Beneficiary, including any unpaid benefits due or to become due. If no Direct Beneficiary or Contingent Beneficiary survives the Insured the proceeds of this Policy shall be payable to the executors, administrators or assigns of the Insured. No such designation, revocation, change or direction shall be effective unless duly made in writing and filed at the Home Office of the Company (accompanied by this Policy) prior to or at the time this Policy shall become payable, and endorsed hereon by the Company.

Conversion to Another Plan.

12. Without the consent or participation of any Direct Beneficiary or any Contingent Beneficiary, this Policy may be converted without medical examination to a Policy of not greater amount on any annual premium Life or Endowment plan as issued by the Company subject to the following conditions:

12a. Within three years from the date hereof the new Policy may be issued as of the date of this Policy upon a form now in use, the premium to conform to the present published rate of the Company for the plan selected at the present age of the Insured; upon payment of the difference in past premiums for the amount of insurance converted with interest at the rate of five per cent. per annum, less corresponding difference in dividends.

12b. Within five years from the date hereof the new Policy may be issued as of the date of the conversion upon a form then in use with premium for the attained age of the Insured conforming to the then published rate of the

(Defendants' Exhibit A)

Company for the plan selected; the first annual premium on the new policy to be paid less the then reserve on the amount of insurance converted hereunder and a due share in the dividend apportionment for the year.

When Effective. 12c. Conversion shall be effective upon suitable request and payment of the amount required with due surrender of this Policy while in force prior to the expiration of five years from the date hereof. Any Direct Beneficiary or Contingent Beneficiary designated herein shall be similarly named with like interest in the new Policy.

.7.

[Page 4]

SPECIAL PROVISIONS RELATING TO SETTLEMENT WHEN THIS POLICY BECOMES PAYABLE.

Options of Settlement. 1. The Insured shall have the right, with the privilege of change before this Policy becomes payable, to elect payment of the then net proceeds, in whole or in part, under either Option "A", "B", "C" or "D", or under two or more of said options.

Privileges of Direct Beneficiary. 1.a If when this Policy becomes payable no such election by the Insured is then in force, the Direct Beneficiary or Beneficiaries may make such election in lieu of payment in one sum and upon such an election by the Direct Beneficiary or Beneficiaries the interest of any Contingent Beneficiary designated by the Insured shall terminate. The Direct Beneficiary or Beneficiaries may then, subject to change, desig-

(Defendants' Exhibit A)

nate a Contingent Beneficiary or Beneficiaries under the election so made.

Limit of Amounts. 2. If the net proceeds of this Policy shall be less than $1000 or the performance of an election would result in periodical minimum payments less than $10, the Company may deem the election ineffective and settlement may be made by payment of the proceeds or the then commuted value in one sum.

[Endo]rsement. 3. No election, designation, direction, revocation or change shall be effective unless duly made in writing and filed at the Home Office of the Company (accompanied by this Policy), and endorsed hereon by the Company, nor shall Options "A", "C" and "D" be available to any beneficiary not a natural person taking benefit in his or her own right.

Deceased Direct [Be]neficiary. 4. If there be more than one Direct Beneficiary living when this Policy becomes payable the share of any such beneficiary thereafter deceased, including any unpaid benefits due or to become due, shall pass to the surviving Direct Beneficiary or Beneficiaries unless otherwise directed by the Insured with the consent of the Company; except that under Option "C" the interest so passing shall be limited to the stipulated installments then remaining unpaid.

[Co]ntingent [Be]neficiary. 5. Upon the death of the last surviving Direct Beneficiary the then surviving Contingent Beneficiary or Beneficiaries shall succeed to the remaining benefits otherwise payable to such Direct Beneficiary, including any unpaid benefits due or to become due, except that under Option "C" such remainder shall be limited to the stipulated installments then remaining unpaid; and except also that any proceeds then held under Option "A" shall, unless the designator

(Defendants' Exhibit A)

of such surviving Contingent Beneficiary has directed payment under either Option "B", "C" or "D", be paid in one sum (a) immediately in case of any Contingent Beneficiary designated under Special Provisions, paragraph "1a" and (b) if and when, in case of a Contingent Beneficiary designated by the Insured, such proceeds shall have been held under Option "A" for thirty years after the Policy became payable. Where payment of such proceeds under either Option "B", "C" or "D" has been directed in lieu of payment in one sum, such elected option shall thereupon become effective.

Last Surviving Beneficiary.

6. At the death of the last surviving Direct Beneficiary if there be no Contingent Beneficiary then in being, or at the death of the last surviving Contingent Beneficiary occurring subsequently thereto, any amount retained by the Company under Option "A"; any remainder of the fund under Option "D"; the commuted value, on the basis of compound interest at 2½ per cent, per annum, of any limited installments under Option "B" or any stipulated installments under Option "C", then remaining unpaid; shall, unless otherwise directed by the designator with the consent of the Company, be paid in one sum to the executors, administrators or assigns of such last surviving Direct Beneficiary or Contingent Beneficiary upon due surrender of this Policy.

mutation and ithdrawal

7. The person then entitled as beneficiary shall upon due surrender of this Policy have the right at any time, provided the designator of such beneficiary shall not have specifically withheld such right, to withdraw any proceeds held by the Company under Option "A"; the commuted value, determined as pro-

(Defendants' Exhibit A)

vided in Special Provisions, paragraph "6", of any unpaid installments under Option "B" or any remainder of the fund under Option "D". Benefits under Option "C" shall not be subject to commutation and withdrawal.

Proceeds Conserved at Interest

8. OPTION A: Subject to the limitations contained in Special Provisions, paragraph "5", to have the whole or any designated part of the net proceeds held by the Company, the Company in the meantime to pay interest thereon monthly at the minimum rate of $2.06 per $1000 of the amount so held, the first payment being due one month after date of death of Insured or the date of election if subsequent.

Limited Installments.

9. OPTION B: To have the whole or any designated part of the net proceeds paid in a specified number of monthly minimum installments as per the Limited Installment Table below, which shall apply pro rata per $1000 of the amount to be so paid, the first installment being payable as of the date of death of Insured or the date of election if subsequent.

Limited Installment Table.

OPTION "B," LIMITED INSTALLMENT TABLE

Number of monthly Installments	12	24	36	48	60	72	84	96	108	120	132	144	156
Amount of each	$84.28	$42.66	$28.79	$21.86	$17.70	$14.93	$12.95	$11.47	$10.32	$9.39	$8.64	$8.02	$7.49
Number of monthly Installments	168	180	192	204	216	228	240	252	264	276	288	300	360
Amount of each	$7.03	$6.64	$6.30	$6.00	$5.73	$5.49	$5.27	$5.08	$4.90	$4.74	$4.60	$4.46	$3.93

Installments Continuous for-Life.

10. OPTION C: To have the whole or any designated part of the net proceeds paid in either 120, 180 or 240 stipulated monthly minimum installments

(Defendants' Exhibit A)

of the amount stated in the Continuous Installment Table corresponding to the sex and the age of the then beneficiary on the date of payment of the first of such installments, provided that if such beneficiary shall survive to receive the number of stipulated installments selected, payments of like amount and frequency shall continue during the lifetime of the beneficiary. The table shall apply pro rata per $1000 of the amount to be so paid, the first installment being payable as of date of death of Insured or the date of election if subsequent. If there be two or more beneficiaries the amount payable, unless otherwise directed by the designator, shall be divided into a corresponding number of equal parts and the installments to each beneficiary will be similarly determined according to age and sex by the Continuous Installment Table. Payment under this option shall be subject to satisfactory proof of the age of the beneficiary thereunder.

7 & 10.

[Page 5]

OPTION "C," CONTINUOUS INSTALLMENT TABLE

Number of Monthly Installments Stipulated
Age of Beneficiary | 120 Male | Female | 180 Male | Female | 240 Male | Female

ontinuous
ıstallment
Table.

Age of Beneficiary	Number of Monthly Installments Stipulated					
	120		180		240	
	Male	Female	Male	Female	Male	Female
20 and under	$3 22	$3 11	$3 21	$3 10	$3 20	$3 09
21	3 25	3 13	3 24	3 12	3 23	3 11
22	3 28	3 15	3 27	3 14	3 25	3 13

(Defendants' Exhibit A)

23	3 30	3 17	3 29	3 17	3 28	3 16
24	3 33	3 20	3 32	3 19	3 31	3 18
25	3 36	3 22	3 35	3 21	3 34	3 20
26	3 40	3 25	3 38	3 24	3 36	3 23
27	3 43	3 28	3 42	3 27	3 40	3 25
28	3 46	3 30	3 45	3 29	3 43	3 28
29	3 50	3 33	3 48	3 32	3 46	3 31
30	3 54	3 36	3 52	3 35	3 49	3 34
31	3 58	3 40	3 56	3 38	3 53	3 36
32	3 62	3 43	3 60	3 42	3 57	3 40
33	3 66	3 46	3 64	3 45	3 60	3 43
34	3 71	3 50	3·68	3 48	3 64	3 46
35	3 75	3 54	3 72	3 52	3 68	3 49
36	3 80	3 58	3 77	3 56	3 72	3 53
37	3 85	3 62	3 82	3 60	3 76	3 57
38	3 91	3 66	3 87	3 64	3 81	3 60
39	3 96	3 71	3 92	3 68	3 85	3 64
40	4 02	3 75	3 97	3 72	3 90	3 68
41	4 08	3 80	4 02	3 77	3 95	3 72
42	4 14	3 85	4 08	3 82	4 00	3 76
43	4 20	3 91	4 14	3 87	4 05	3 81
44	4 27	3 96	4 20	3 92	4 10	3 85
45	4 34	4 02	4 26	3 97	4 15	3 90
46	4 42	4 08	4 33	4 02	4 20	3 95
47	4 49	4 14	4 39	4 08	4 25	4 00
48	4 57	4 20	4 46	4 14	4 31	4 05
49	4 65	4 27	4 53	4 20	4 36	4 10
50	4 74	4.34	4 60	4 26	4 42	4 15
51	4 83	4 42	4 68	4 33	4 48	4 20
52	4 92	4 49	4 75	4 39	4 53	4 25
53	5 02	4 57	4 83	4 46	4 59	4 31
54	5 12	4 65	4 91	4 53	4 65	4 36
55	5 22	4 74	4 99	4 60	4 70	4 42
56	5 33	4 83	5 08	4 68	4 76	4 48

(Defendants' Exhibit A)

57	5 44	4 92	5 16	4 75	4 82	4 53
58	5 56	5 02	5 25	4 83	4 87	4 59
59	5 68	5 12	5 33	4 91	4 92	4 65
60	5 80	5 22	5 42	4 99	4 98	4 70
61	5 93	5 33	5 51	5 08	5 03	4 76
62	6 06	5 44	5 60	5 16	5 08	4 82
63	6 20	5 56	5 68	5 25	5 12	4 87
64	6 34	5 68	5 77	5 33	5 17	4 92
65	6 48	5 80	5 85	5 42	5 21	4 98
66	6 63	5 93	5 94	5 51	5 25	5 03
67	6 77	6 06	6 02	5 60	5 28	5 08
68	6 92	6 20	6 10	5 68	5 32	5 12
69	7 08	6 34	6 18	5 77	5 34	5 17
70	7 23	6 48	6 25	5 85	5 37	5 21
71	7 38	6 63	6 32	5 94	5 40	5 25
72	7 53	6 77	6 38	6 02	5 42	5 28
73	7 69	6 92	6 45	6 10	5 44	5 32
74	7 84	7 08	6 50	6 18	5 45	5 34
75 and over	8 00	7 23	6 56	6 25	5 47	5 37

Fixed tallments.

11. OPTION D: To have the whole or any designated part of the net proceeds held by the Company as a fund to be credited annually with interest at the minimum rate of 2½ per cent. per annum on the balance in hand and from which shall be paid, until the fund is exhausted, equal monthly installments (first installment payable as of date of death of Insured or the date of election if subsequent) of such fixed amount, not less than $5.00 per $1000 of the proceeds so retained, as shall have been elected, the final installment not to exceed the then unpaid remainder.

(Defendants' Exhibit A)

Participation. 12. Interest payments under Option "A"; the second and subsequent installments under Option "B"; the second and subsequent stipulated installments under Option "C"; and the fixed installment fund under Option "D" will be subject to increase by such dividends as may be apportioned by the Company.

Possession of Policy. 13. During settlement under the Special Provisions this Policy shall remain in the possession of the beneficiary or beneficiaries thereunder.

Annual, Semi-Annual, Quarterly Payments. 14. Upon suitable request and endorsement, the mode of payment under Options "A", "B", "C" and "D" may be changed to equivalent quarterly, semi-annual or annual payments.

OD. 7 & 10.

[Page 6]

Agreement attached to and made a Part of Policy No. 3204489

(hereinafter called the Policy)

WAR AND AVIATION RESTRICTION CLAUSE

It is agreed that said Policy shall be subject to the modifications, restrictions, limitations, exclusions and conditions herein set forth, to wit:

1. Anything in this Policy to the contrary notwithstanding and while said Policy continues in force the liability of the Company in any one or more of the events stated in the following provisions designated "1a", "1b", and "1c" shall be restricted and limited to the greater amount of (i) the gross premiums charged as due and paid on the Policy less any annual dividends paid or credited and less also any indebtedness to the Company (in-

(Defendants' Exhibit A)

cluding interest due or accrued) on account of the Policy which has not been repaid in cash; or (ii) the reserve on the Policy including any paid-up additions thereto and any dividends standing to the credit of the Policy and less any indebtedness on account of the Policy including interest due or accrued; provided, however, that the liability as so restricted shall not exceed the amount otherwise payable if this agreement were not a part of the Policy. The liability of the Company shall be restricted as aforesaid in the event of:

1a. The death of the Insured outside the forty-eight states of the United States, the District of Columbia and the Dominion of Canada (such territory hereinafter called the Home Areas) (i) while in the military, naval or air forces of any country at war, declared or undeclared, or any ambulance, medical, hospital or civilian non-combatant unit serving with such forces; or (ii) death either outside or inside the Home Areas occurring within six months after termination of service outside of the Home Areas in such forces or units as the result of a service connected cause.

1b. The death of the Insured within two years from the date of issue of the Policy as a result of any act of war, declared or undeclared, when the cause of death occurs while the Insured is outside the Home Areas and the Insured dies either outside such Home Areas or within six months after returning thereto.

1c. The death of the Insured resulting from his or her occupation as pilot, co-pilot or student pilot or member of the crew or in any capacity connected with the operation of any aircraft, or from transportation in an aircraft other than as a fare-paying passenger of an established air line.

(Defendants' Exhibit A)

2. It is further agreed that any provision in or attached to this Policy notwithstanding, the risk of benefits contingent upon proof of the physical or mental disability of the Insured is a risk not covered by the Policy if such disability is a consequence of wounds, injuries or disease suffered or contracted as a result of any of the services or any act of war as specified in the provisions herein designated "1a" and "1b", or any of the occupations specified in provision "1c", or transportation in any aircraft except as a fare-paying passenger of an established air line.

3. It is further agreed as a condition to issuance that the incontestability provision contained in the Policy is hereby amended to read "Except for non-payment of premium this Policy shall be incontestable after it has been in force during the lifetime of the Insured for a period of two years from its date of issue, and except as to any provision of the War and Aviation Agreement. If the age of the Insured has been misstated the amount, if any, payable hereunder shall be such as the premium paid would have purchased at the correct age."

In Witness Whereof The Northwestern Mutual Life Insurance Company has caused this Agreement to be executed at Milwaukee, Wisconsin, this 2nd day of December, 1942.

War and Aviation
Agreement

Form DD. 690
April 1942

G. L. Anderson
Secretary

[Illegible]
President

Attest: [Illegible]
Registrar

(Defendants' Exhibit A)

[Stamped]: Pol. Hg. Div. 1 1944 Feb 7 AM 11 44
(1197-CP)

(For Use in States Having Community Property Laws)

CHANGE AND DESIGNATION OF DIRECT BENEFICIARY

In Policies Now Issued in

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY
Milwaukee, Wisconsin

N. B.—Read footnotes carefully before filling in this request.

Pasadena, Calif. January 26, 1944
(Place and date)

Said Company is requested by the undersigned to designate

Genevieve B. Hill
(Print name in full)

wife ,...
(Relationship to insured) (For two, enter "share and share alike, or the survivor;" for three or more, "share and share alike, the survivors or survivor")

as direct beneficiary under policy No. 3204489 with reservation of the right on the part of the insured to change such designation; it being expressly agreed that the further right shall be reserved to the insured to obtain loans from said Company upon security of said policy, or to surrender the same for its cash value, without the consent or participation of any direct beneficiary not now or hereafter irrevocably designated. The prior designation of direct beneficiary is hereby revoked.

(Defendants' Exhibit A)

The rights of any payee herein designated shall be subject and subordinate to any indebtedness on account of said policy in favor of said Company.

The present designation of contingent beneficiary, if
any, shall (remain unchanged) Initial
(be revoked) Deletion

Said Company is hereby requested and directed to make the foregoing provisions a part of the policy.

Community Property Rights—The insurance under the said policy is subject to any community property rights of any spouse of the insured unless such rights are waived in writing by such spouse and the waiver filed at the Home Office of the Company; but such spouse may, in the space provided below, consent to the foregoing designation (if the direct beneficiary is other than the spouse), concur in any contingent beneficiary designation now effective and waive all community property rights inconsistent with such designations. *If the insurance is to be dealt with exclusive of any and all community property rights and interests of the spouse of the insured, Doc. 1478-CP. should be executed by the spouse and filed at the Home Office of the Company. (See footnote 5)*

Witnesses:

[Illegible] Geo. A. Hill Jr.

Insured sign here

For a Valuable Consideration, I hereby consent to the foregoing designation of direct beneficiary, concur in any

(Defendants' Exhibit A)

contingent beneficiary designation now effective and waive all community property rights inconsistent therewith.

....
Signature of Spouse of Insured

1. If the proposed direct beneficiary is to be irrevocably designated, substitute the word "without" for the word "with" in the fourth line such change to be duly authenticated by the initials of the insured. An irrevocable designation of a minor may tie up the policy during minority, and any such designation must be accompanied by a statement by the insured that the result of such action is fully understood.

2. This form should not be used for change or correction in a direct beneficiary's name. Submit a statement by the insured.

3. If the irrevocable interest of a wife as direct beneficiary is being terminated with her consent, her signature must be duly acknowledged. (See Par. 143—Rules and Instructions.)

4. This form should be completed as indicated, executed by the insured alone, or jointly with other parties required to effect the change and forwarded to the Home Office. Unless the policy is in the Company's possession, it must be submitted for suitable endorsement.

5. Where the parties are divorced and the insurance is to be set over to one of them, a special form will be furnished by the Home Office upon receipt of full information.

(3-43)

(Defendants' Exhibit A)

[Stamped]: Pol. Hg. Div. 1 1944 Feb 7 AM 11 44 121

(1197A-CP)

(For Use in States Having Community Property Laws)

DESIGNATION OF CONTINGENT BENEFICIARY

In Policies Now Issued or Applied for in

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY

Milwaukee, Wisconsin

N. B.—Read footnotes carefully before filling in this request.

Pasadena, Calif. January 26, 1944
(Place and date)

I hereby designate

Peter B. Hill, Joanne Hill, and Patricia Hill Harder
(Print name in full)

children, share & share alike, the survivors or survivor
(Relationship) (For two, enter "share and share alike, or the survivor;" for three or more, "share and share alike, the survivors or survivor")

as contingent beneficiary under policy No. 3204489 issued, or applied for, on my life, with reservation of the right on my part to revoke or change such designation; it being expressly agreed that the further right is reserved to me to obtain loans from said Company upon security of said policy, or to surrender the same for its cash value, without the consent or participation of any contingent beneficiary.

All prior designations, if any, of contingent beneficiaries and settlement options as applying to such contingent beneficiaries are hereby revoked and settlement with the herein designated contingent beneficiary shall be in one sum unless now or hereafter otherwise directed. (See footnote 1.)

(Defendants' Exhibit A)

The rights of any payee herein designated shall be subject and subordinate to any indebtedness on account of said policy in favor of said Company.

Said Company is hereby requested and directed to make the foregoing provisions a part of the policy.

If this request supplements an application for insurance, said Company is authorized to insert herein the number of the policy, if issued.

Community Property Rights—The insurance under the said policy is subject to any community property rights of any spouse of the insured unless such rights are waived in writing by such spouse and the waiver filed at the Home Office of the Company; but such spouse may, in the space provided below, consent to the foregoing designation, concur in the direct beneficiary designation now effective and in any settlement options as applying to such direct beneficiary designation and waive all community property rights inconsistent with such designations. *If the insurance is to be dealt with exclusive of any and all community property rights and interests of the spouse of the insured, Doc. 1478-CP should be executed by the spouse and filed at the Home Office of the Company.* (*See footnote 6.*)

Witnesses:

[Illegible] Geo. A. Hill Jr.

Designator sign here

For a Valuable Consideration, I hereby consent to the foregoing designation of contingent beneficiary, concur

(Defendants' Exhibit A)

in the direct beneficiary designation now effective and in any settlement options as applying to such direct beneficiary designation and waive all community property rights inconsistent with such designations.

....
Signature of Spouse of Insured

1. If a settlement option for the contingent beneficiary is to be made effective under the policy, the designator's carefully prepared request giving specific directions should accompany this document.

2. If more than one policy is to be issued upon an application, the designator should state under which policy or policies the contingent beneficiary is to be named.

3. If the wife of the designator is named direct beneficiary, and if in addition to the nomination of their present children as contingent beneficiaries, other children born of the marriage are to be included, the names of the present children should be followed by "and any other child or children born of my marriage to (wife's name), share and share alike, the survivors or survivor." A female insured may designate her present children by name followed by "and any other child or children born to me, share and share alike, the survivors or survivor."

4. This request should be dated, signed, witnessed and forwarded to the Home Office. Unless the policy is in the Company's possession it must be forwarded with the request for the required endorsement.

6. Where the parties are divorced and the insurance is to be set over to one of them, a special form will be furnished by the Home Office upon receipt of full information.

(4-43)

(Defendants' Exhibit A)

THE NORTHWESTERN MUTUAL
LIFE INSURANCE COMPANY
of Milwaukee, Wisconsin

Number	Amount
3 204 489	$10,000

INSURING LIFE OF
GEORGE A. HILL, JR.
Date December 2, 1942
Age 49

PREMIUMS PAYABLE QUARTERLY
EQUIVALENT PREMIUM BASES*
Paragraph 6 of General Provisions, Page 3

Annual . . . . . . $........
Semi-Annual . . . . $........
Quarterly $48.50

*Includes Extra Premiums if Any.

The General Election of Trustees of the Company is held annually at its Home Office in Milwaukee the third Wednesday of July. Policyholders are entitled to vote at such elections.

Non-Renewable
FIVE YEAR TERM POLICY
(Convertible Within Five Years)
Premiums Payable for Five Years
or Until Prior Death of Insured
Dividends Payable Annually

TRinity 3821
Special Agent
ALFRED C. DUCKETT
Edwards & Wildey Bldg.
(Third Floor)
Los Angeles

[Stamped]: Murphy & Mage, Gen'l Agts. 609 So. Grand Ave. Los Angeles, Cal.

[Endorsed]: Filed Nov. 13, 1945.

Mr. Snow: Your Honor please, just on that subject, Mr. Wright is here to preserve the interests of the insurance company, and if it can be so ordered, he should like to take the original policy back by substituting a photostat copy, so we would ask the court if the photostat copy may be substituted in lieu of the original, by stipulation of counsel.

Mr. L. M. Wright: I believe the document furnished was a copy. I still have the original.

Mr. Snow: Then I shall withdraw that statement.

The Court: I should like to see the original, gentlemen.

Mr. Snow: I thought it was the original that had been submitted.

The Court: It may be left here, and then it may be withdrawn at the conclusion of the case, Mr. Wright. [3]

Mr. Snow: Will that satisfy you?

Mr. Wright: Certainly.

The Court: I think the original should be marked as an exhibit in the case and then withdrawn later on. I will examine it a little more carefully later.

Proceed, gentlemen.

Mr. Snow: Then perhaps, your Honor, at this moment, under Mr. Hall's suggestion, we should call the court's attention to this additional fact, which we believe should be a part of the stipulation, which is that the wife, the direct beneficiary, did not make an election, as provided under Section 1a of the Special Provisions of the Policy. I believe Mr. Hall said, so far as he was concerned, he would so stipulate that that is the fact.

Mr. Hall: I will so stipulate.

The Court: So understood, without further proof. Proceed.

Mr. Snow: Now, if your Honor please, we should like to know just who is to go ahead on the matter. We have had some difficulty in deciding who is the first and who is the second. We are both standing on about equal bases, claiming the proceeds, and whatever procedure your Honor directs I am sure we will be very happy to follow.

The Court: I presume there is no set procedure. I have never known of any. Probably the most satisfactory would be to take the pleadings chronologically. [4]

Mr. Snow: We filed the first answer, I believe, and Mr. Hall filed the first brief, so that is how it stands.

The Court: I don't think it makes any difference, but there must be some way in which the case can proceed in an orderly manner.

Mr. Snow: I think whatever your Honor would indicate would be satisfactory.

Mr. Hall: That is satisfactory to me, whatever your Honor would suggest.

The Court: Very well. We will follow that practice which we have in other interpleader cases. I have never had any one call to the court's attention any fixed procedure applicable to all cases.

Mr. Snow: May we then present our argument?

The Court: Yes.

(Argument on behalf of Defendants Peter B. Hill, Joanne Hill and Patricia Hill Harder by Mr. Snow.)

* * *

The Court: May I interrupt you as you go along?

Mr. Snow: I would appreciate it if you would do that, your Honor.

The Court: If it disconcerts you I should not want to do it.

Mr. Snow: Not in the least, your Honor.

The Court: At the time of the passing of the widow, had [5] the proofs of loss been filed?

Mr. Snow: Yes, your Honor. The facts set out in the briefs stipulate that proof of death had been filed and proceeds had not been paid out by the insurance company.

The Court: The ages of these children of the first marriage of the insured I haven't been able to find. I haven't examined the policy, of course, because it wasn't before the court. There isn't anything in the record to show the ages of those children.

Mr. Snow: I regret to state that I personally don't know their ages either.

I don't think there is anything in the provisions of the policy that state that fact, but I had not discovered that the point would make any difference in the determination of the issues. It might, Mr. Forster suggests, make some difference in the payment of the money, but there is no provision which has been called to my attention where it would make any difference.

Would your Honor like that information presented?

The Court: Yes, I think so.

Mr. Snow: May it be understood that we can get it and supply it as a statement of fact, and submit it as a part of the evidence?

Mr. Hall: So stipulated.

The Court: So understood. [6]

(Further argument by Mr. Snow.)

(Argument on behalf of Defendants Victor H. Rossetti and Frank P. Doherty, by Mr. Hall.)

Mr. Forster: All of the children are adults, your Honor. I have the birthdays. They were not at the date of death.

Mr. Snow: It has now been supplied to us, and I take it we can accept it as a fact, that Joanne Hill was born on May 18, 1922; that Patricia Hill was born on April 12, 1921; and that Peter Hill was born on February 18, 1924.

(Further argument by Mr. Snow.)

The Court: The matter will be submitted for decision. I will return the policy to Mr. Wright. At the time of the entry of the interlocutory decree, Mr. Wright—

Mr. Wright: Yes, sir.

The Court: —was the policy canceled when the money was deposited?

Mr. Wright: I believe that is correct.

The Court: It should have been.

Mr. Hall: I think that was discussed, and was done. I believe that was the request made in the complaint.

Mr. Wright: That is correct.

The Court: I just examined the files so hurriedly I did not observe that there had been anything in the record to show that had been done.

Mr. Wright: I believe you are correct, your Honor. [7] I believe that that was done in the interlocutory order; also issuance of a permanent injunction restraining the parties from bringing suit in any state or federal court other than this court.

The Court: I think the original policy should have been filed as an exhibit in the case and then canceled, and then a photostat substituted.

Mr. Wright: I would appreciate in the final judgment some provision relative to cancellation of the policy.

Mr. Hall: Pardon me, your Honor, may I ask one question? If it should occur that judgment is rendered and the proceeds are to be paid out, say, to the executors of the estate, as an assumption, would they be paid promptly or would there be some stay?

The Court: I think so. Would it be agreeable to both sides to stay the execution at least ten days?

Mr. Snow: Yes.

Mr. Hall: Thank you, your Honor. If that may be a part of the stipulation?

The Court: So ordered. [8]

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 21 day of December A. D., 1945.

MARIE G. ZELLNER
Official Reporter

[Endorsed]: Filed Dec. 27, 1945.

[Endorsed]: No. 11235. United States Circuit Court of Appeals for the Ninth Circuit. Victory H. Rossetti and Frank P. Doherty, co-executors of the estate of Genevieve Borlini Hill, Appellants, vs. Peter S. Hill, Joanne Hill, also known as Joan A. Hill, Patricia Hill Harder and The Northwestern Mutual Life Insurance Company. Appellees. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed January 19, 1946.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11235

VICTOR H. ROSSETTI and FRANK P. DOHERTY, co-executors of the estate of Genevieve Borlini Hill,

Appellants,

v.

PETER B. HILL, JOANNE HILL, also known as JOAN A. HILL, PATRICIA HILL HARDER, and THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, a corporation,

Appellees.

STATEMENT OF POINTS ON WHICH APPELLANTS INTEND TO RELY ON APPEAL.

To: The Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit; and Honorable Paul P. O'Brien, Clerk of That Court:

Come now appellants herein, and in accordance with paragraph 6 of Rule 19 of this Court file with the Clerk of this Court their concise statement of the points on which appellants intend to rely on their appeal herein:

1. That the District Court erred in interpreting the policy so as to award the proceeds thereof to insured's children (contingent beneficiaries) instead of to the executors of the estate of his wife (direct beneficiary).

2. That the District Court erred in finding that it was insured's intention to financially provide for and protect by the policy his children (contingent beneficiaries) rather

than the creditors, heirs or legatees of the estate of his wife (direct beneficiary) if she should survive the insured but die before receiving the proceeds of the policy.

Respectfully submitted,

VICTOR H. ROSSETTI and
FRANK P. DOHERTY,
Co-Executors of the Estate of Genevieve Borlini Hill, Appellants,

By LAWLER, FELIX & HALL
By John M. Hall
Their Attorneys.

Receipt of a copy of the foregoing Statement of Points is acknowledged. January 14th, 1946. O'Melveny & Myers, by L. M. Wright, Attorneys for Appellee, The Northwestern Mutual Life Insurance Company. January 14th, 1946. Richard H. Forster, Chauncey E. Snow, by Chauncey E. Snow, HOW, Attorneys for Appellees, Peter B. Hill, Joanne Hill and Patricia Hill Harder.

[Endorsed]: Filed Jan. 19, 1946. Paul P. O'Brien, Clerk.

No. 11245.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

Victor H. Rossetti and Frank P. Doherty, executors of the estate of Genevieve Berlin Hill,

Appellants,

vs.

Flora B. Hill, Joseph Hill, also known as John A. Hill, Patricia Hill Hardie and The Northwestern Mutual Life Insurance Company,

Appellees.

APPELLANTS' OPENING BRIEF.

Lawler, Felix & Hall,
John M. Hall,
900 Standard Oil Building, Los Angeles 15,
Attorneys for Appellants, Victor H. Rossetti and Frank P. Doherty, Coexecutors of the Estate of Genevieve Berlin Hill.

FILED

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(1) The policy obligated the insurance company to pay immediately upon the death of the insured. This obligation required that the person to whom payment was to be made be ascertainable immediately upon the death of the insured. This definite intent disclosed by the terms of the policy required that its proceeds be paid immediately to insured's wife when she survived him. All other provisions of the policy should be interpreted in harmony with this intent 6

(2) The rule of law, which should be applied in the absence of a policy provision clearly forbidding its application, is that upon the death of the insured a beneficiary who survives him acquires a vested interest. This policy should be interpreted in harmony with this rule of law 9

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II.

The District Court erred in finding that it was insured's intention to financially provide for and protect by the policy his children rather than the creditors, heirs or legatees of the estate of his wife if she should survive the insured but die before receiving the proceeds of the policy 29

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No. 11235.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

VICTOR H. ROSSETTI and FRANK P. DOHERTY, co-executors of the estate of Genevieve Borlini Hill,

Appellants,

vs.

PETER B. HILL, JOANNE HILL, also known as Joan A. HILL, PATRICIA HILL HARDER and THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,

Appellees.

APPELLANTS' OPENING BRIEF.

Statement Showing Jurisdiction.

Complainant's bill of interpleader in the District Court alleged that complainant was an insurance corporation under the laws of Wisconsin, and that defendants, all of whom were citizens of California, were making adverse claims to $10,060.10, the proceeds of a certain insurance policy, in the possession of complainant. [R. 2 *et seq.*][1]

These facts were admitted by the answers of all defendants. [R. 10, 14.] The District Court had jurisdic-

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[1]Herein references to pages of the record are designated: R. Italics throughout this brief have been supplied.

tion under 28 U. S. C. A., Sec. 41, Subd. 1, for the matter in controversy exceeded $3,000 and the suit was between citizens of different States.

> *Security Trust & Savings Bank v. Walsh,* 91 F. (2d) 481 (C. C. A. 9, 1937).

This appeal by two of the defendants is from the District Court's final judgment [R. 29, 30] awarding the fund in controversy to the other three defendants. Timely notice of appeal was filed [R. 31], and the appeal was duly perfected. [R. 32 *et seq.*] This Court has jurisdiction under 28 U. S. C. A., Sec. 225, Subd. (a) First, and (d).

Statement of the Case.

On December 2, 1942, appellee, Northwestern Mutual Life Insurance Company, issued to George A. Hill, Jr., its five-year term life insurance policy by which it agreed that "immediately upon receipt of due proof of the death of the insured, if such death shall occur within said five years, Northwestern Mutual Life Insurance Company . . . promises to pay . . . Ten Thousand Dollars" to insured's children therein named as "direct beneficiaries." [R. 36b, 39.]

On January 26, 1944, the insured revoked his prior designation of direct beneficiaries, and designated his wife, Genevieve B. Hill, as "direct beneficiary," and, on the same date, by separate instrument designated his children as "contingent beneficiary." [R. 55 *et seq.*]

The insured died on November 24, 1944. Due proof of death was submitted to and received by the insurance

company. Thereafter, on Janury 2, 1945, prior to payment of the proceeds of the policy, the insured's wife, the direct beneficiary, died. [R. 36b.]

Thereafter appellants, who are the executors of the wife's estate, on the one hand, and appellees, who are the children named as contingent beneficiaries, on the other hand, claimed the proceeds of the policy. [R. 36b.] Because of these conflicting claims, the insurance company filed this interpleader action to obtain an adjudication as to the persons entitled to the proceeds of the policy. [R. 2 *et seq.*]

The facts are not in controversy.

Both answers [R. 10, 14] admitted the allegations of the bill of interpleader [R. 2] including the jurisdictional facts noted above. At the trial the insurance policy was received in evidence [R. 38], as well as a statement of the fact. [R. 36b, 38.] The amount due on the policy, now in the registry of the District Court, is admitted to be $9,796.10. [R. 27.]

The ultimate question is whether appellants, the executors of the wife's estate, or the appellees, children of the deceased, are entitled. While these two sets of claimants are the adversary parties, the solution of this question requires a determination of what was the obligation of the insurance company under its contract with the insured.

The District Court gave judgment for the appellees. [R. 29.] This appeal is from such judgment. [R. 31.]

Specification of Errors Relied Upon.

1. That the District Court erred in interpreting the policy so as to award the proceeds thereof to insured's children (contingent beneficiaries) instead of to the executors of the estate of his wife (direct beneficiary). This erroneous interpretation is stated in par. 7 of the findings of fact [R. 27], and in pars. 1, 2, 3 and 4 of the conclusions of law [R. 28], and in pars. 1 and 2 of the judgment. [R. 30.]

2. That the District Court erred in finding that it was insured's intention to financially provide for and protect by the policy his children (contingent beneficiaries) rather than the creditors, heirs or legatees of the estate of his wife (direct beneficiary) if she should survive the insured but die before receiving the proceeds of the policy. This erroneous finding is stated in par. 7 of the findings of fact. [R. 27.]

These errors were stated in appellants' Statement of Points [R. 68, 69], and will be separately considered in the following argument.

ARGUMENT.

I.

The District Court Erred in Interpreting the Policy so as to Award the Proceeds Thereof to Insured's Children Instead of to the Executors of the Estate of His Wife.

The result produced by the judgment challenges attention.

Insured's wife, the direct beneficiary under the policy, survived the insured thirty-nine days. During that period she made due proof of death to the insurance company. However, payment of the proceeds of the policy to her was not made during such thirty-nine day period. If it had been, it is conceded that she could have kept such proceeds. But having died before she received the proceeds, it is decreed that the proceeds must go to the contingent beneficiaries under the policy.

Such an interpretation of the policy, which as a practical matter made the right to the proceeds depend upon the promptness with which they were paid, should not be accepted unless clearly required by the express terms of the policy.

It is respectfully submitted that such interpretation was not warranted.

(1) The Policy Obligated the Insurance Company to Pay Immediately Upon the Death of the Insured. This Obligation Required That the Person to Whom Payment Was to Be Made Be Ascertainable Immediately Upon the Death of the Insured. This Definite Intent Disclosed by the Terms of the Policy Required That Its Proceeds Be Paid Immediately to Insured's Wife When She Survived Him. All Other Provisions of the Policy Should Be Interpreted in Harmony With This Intent.

The policy begins with a promise to pay the proceeds "*immediately* upon receipt of due proof of the death of the insured" to the direct beneficiary (the insured's widow) [R. 39], unless an election is exercised under the "Special Provisions." [R. 45.]

No such election was exercised. [R. 62.]

The policy was a contract between the insured and the company, and the rights of appellants and appellees are derived solely from such contract.

But in order to pay the proceeds *immediately* upon receipt of such proof, there had to be someone to whom the proceeds could be paid—someone ascertainable *at that time,* not at later time. The obligation to pay *immediately* went hand in hand with an obligation to pay to one who might be *immediately identified.*

Apart from the contract, *i.e.,* the policy itself [R. 39 *et seq.*] as amended by the documents changing the beneficiaries [R. 55 *et seq.*], there is no evidence of the insured's intent.[2] Such intent must be ascertained solely from the terms of the contract.

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[2]The absence of any evidence of the insured's intent, except as disclosed by the language of the policy, is pointed out under point II of this brief.

The contract shows a clear and definite intent that the proceeds of the policy shall be paid *immediately* upon due proof of death *to the insured's widow;* that she shall be vested with a right to enforce the company's promise to pay immediately upon the insured's death and the submission of the required proof.

Any other conclusion would be tantamount to saying that, while the insured intended the policy to be payable *immediately* to his wife, he intended also that *such right might be lost if the insurance company failed to perform its promise to pay immediately;* that he intended that the selection of the beneficiary should in effect rest with the insurance company and depend upon what the insurance company did after his death.

A contract must receive such interpretation as will make it operative, *definite,* reasonable and capable of being carried into effect if it can be done without violating the intention of the parties.[3] Of course the insurance company intended to assume an obligation which was *definite,* not only as to the time of payment, but also as to the person to whom such payment was to be made. It must have been even more important to the insured that he have a contract which specified *definitely* the obligation of the insurance company as to both the time of payment and the beneficiary. Certainly it would be unreasonable to conclude that the insured intended that the proceeds of the policy should be payable to his wife if paid *imme-*

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[3]California Civil Code, Sec. 1643, provides:

> "A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties."

As hereinafter pointed out, the policy in question having been negotiated for and delivered in California [R. 36b], California law must control its interpretation

diately, but that if the insurance company failed to perform its promise for thirty days or six months or three years he intended that some other person might have the proceeds. Certainly there would be manifest inconsistency in concluding that the insured, having made the time when the policy was payable *definite, i.e.,* payable *immediately* upon his death, intended the identity of the beneficiary of such *immediate* payment to depend upon *indefinite* events which might or might not happen over an *indefinite* period after his death at the whim of the insurance company. Such result would make the contract wholly indefinite and unreasonable. Such result would violate the clear and definite intent of both the insured and the insurance company that the proceeds of the policy should be paid *immediately* upon the insured's death to a beneficiary *then* capable of being definitely identified, who in this case was the insured's widow.

The particular clauses of the insurance contract, hereinafter examined, should be interpreted in harmony with this clear and definite intent.[4]

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[4]California Civil Code, Sec. 1650, provides:

"Particular clauses of a contract are subordinate to its general intent."

(2) The Rule of Law, Which Should Be Applied in the Absence of a Policy Provision Clearly Forbidding Its Application, Is That Upon the Death of the Insured a Beneficiary Who Survives Him Acquires a Vested Interest. This Policy Should Be Interpreted in Harmony With This Rule of Law.

Before examining the policy in detail, attention is invited to the law applicable to the vesting of a beneficiary's interest in the absence of any controlling provision in the policy.

The rule is uniform that upon the death of the insured, the interest of the beneficiary becomes a *vested* interest. If the insured does not reserve a right to change the beneficiary, the interest of the beneficiary may be a vested interest from the outset and during the insured's lifetime. But even where a right to change the beneficiary is reserved (as in the instant case), while the beneficiary's interest is contingent or, as is sometimes said,[5] a mere "expectancy" prior to the insured's death, *it becomes a*

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[5]As said in *Blethen v. Pacific Mut. Life Ins. Co.*, 198 Cal. 91, 243 Pac. 431, 434 (1926):

> "The interest of a beneficiary named in a policy in which the insured may change the beneficiary is not a vested right but merely an expectancy of an incomplete and inchoate gift, which is revocable at the will of the insured and which does not become vested as a right until fixed by death."

vested interest when the insured dies without changing such beneficiary.[6]

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[6]In *Andrews v. Andrews,* 97 F. (2d) 485 (C. C. A. 8, 1938) it was said of certain life insurance policies (p. 487):

> "The policies reserved to the insured the right to change the beneficiary. This being true, in the absence of local statute or state decision to the contrary, the beneficiary had no vested right in them until the death of the insured. [Citing cases.] *But when the insured died, without having changed the beneficiary, the rights under the policies became vested.*" [Citing cases.]

In *Nance v. Hilliard,* 101 F. (2d) 957 (C. C. A. 8, 1939), it was said of a life insurance policy (pp. 958, 959):

> "As the policy reserved to the insured the right to change the beneficiary, she [*i. e.* the beneficiary] had no vested interest in the policy, but a mere expectancy. [Citing cases.] *On the death of the insured, however, she became vested with the absolute right of recovery* unless in the meantime a change in the beneficiary had been effected."

In *Zolintakis v. Orfanos,* 119 F. (2d) 571 (C. C. A. 10, 1941), there was a controversy between the insured's administrator and the executor of the beneficiary named in a life insurance policy concerning their right to the proceeds of the policy. The Court said (p. 575):

> *"Upon maturity of the contract the beneficiary therein became vested with a right to the proceeds of the policy and one who denies the right of a named beneficiary to receive the proceeds of a policy has the burden of showing that the beneficiary is not entitled to the fund."*

In *Ex parte Boddie,* 200 S. C. 379, 21 S. E. (2d) 4 (1942), Scott, the insured in a life insurance policy, named his wife as beneficiary, reserving the right to change such beneficiary. The Court said (21 S. E. (2d) at 8):

> "During the lifetime of Mr. Scott the interest of the beneficiary under the policy was a mere expectancy, since the insured had the right to change the beneficiary at his pleasure. No further change having been made during his lifetime, *upon his death the interest of Mrs. Scott ceased to be contingent, and became a vested interest.*
>
> "At that time the situation was that Mrs. Scott had an absolute right to the proceeds of the insurance, subject only to the assignment to the company, which held it as additional and secondary collateral to the real estate mortgages."

In *Freund v. Freund,* 218 Ill. 189, 75 N. E. 925 (1905), the Court, speaking of a policy of life insurance, said (75 N. E. at 930):

It is said that the interest of the beneficiary *"attaches instantly upon the death of the insured."*[7]

"In the next place, although it may be true that the beneficiary has no vested right in the fund named in the policy during the life of the assured, and has no greater interest than a mere expectancy, *yet, when the assured dies, the beneficiary acquires rights which cannot be cut off, except in the manner prescribed by the contract."*

In the *Freund* case the assured had sought to change the named beneficiary, assured's son, so as to make his wife beneficiary, but such attempt had not been completed in accordance with the requirements of the policy. In holding that the son (the named beneficiary) was entitled to the proceeds of the policy, the Court pointed out that the "son's interest became a vested one" on the death of the assured before the attempted change of beneficiary was completed.

As said in *Bullen v. Safe Deposit & Trust Co.*, 177 Md. 271, 9 Atl. (2d) 581, 583 (1940):

"There can be no doubt that a beneficiary in a life insurance policy has no such interest in it, or control over it, as entitles her to say what shall be done with it, or control the change in beneficiaries, or other dealings during the lifetime of the holder of the policy. *It is only after the death of the holder that such interests or rights attach to the proceeds."*

As said in *Barfoot v. Barfoot,* 245 Ala. 593, 18 So. (2d) 465 (1944):

"The interests of the named beneficiary in a policy of insurance providing for a change of beneficiary at the will of the insured is a mere expectancy. *The right of a named beneficiary, no change having been made in fact or legal effect, becomes a fixed, vested and legal interest, at the death of the insured."*

To the same effect see:

Henderson v. Adams, 308 Mass. 333, 32 N. E. (2d) 295, 297 (1941);

Katz v. Ohio Nat. Bank, 127 Ohio St. 531, 191 N. E. 782, 785 (1934);

Harjo v. Fox, 193 Okla. 672, 146 P. (2d) 298, 302 (1944);

Kentucky Home Life Ins. Co. v. Johnson, 263 Ky. 787, 93 S. W. (2d) 863, 865 (1936);

Cooley's Briefs on Insurance, 2nd Ed., p. 6409.

[7]*Knights of Maccabees v. Sackett,* 34 Mont. 357, 86 Pac. 423, 425 (1906).

The foregoing is the law in California.[8]

Since the policy in question was negotiated for and delivered in California [R. 36b], California law must con-

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[8]As said in *Hoeft v. Supreme Lodge K. of H.*, 113 Cal. 91, 45 Pac. 185, 186 (1896):

> "The beneficiary's interest is the mere expectancy of an incompleted gift which is revocable at the will of the insured, and which does not and cannot become vested as a right *until fixed by his death.*"

As said in *Travelers' Ins. Co. v. Fancher*, 219 Cal. 351, 26 P. (2d) 482, 483 (1933):

> ". . . the designation of a beneficiary in a policy of life insurance initiates in favor of the beneficiary an inchoate gift of the proceeds of the policy, which, if not revoked by the insured prior to his death, *vests in the beneficiary at the time of his death;* . . ."

As said in *Supreme Lodge v. Price*, 27 Cal. App. 607, 150 Pac. 803, 807 (1915):

> ". . . upon the death of the assured, no change in beneficiaries having been made, the person named as beneficiary in the certificate, *ipso facto et eo instanti, acquires a vested right to the benefit money.*"

As said in *Mahony v. Crocker*, 58 Cal. App. (2d) 196, 136 P. (2d) 810, 814 (1943):

> "Normally, the interest of the named beneficiary is merely an expectancy of an inchoate gift *which becomes vested upon the death of the insured.*"

As said in *Cook v. Cook*, 17 Cal. (2d) 639, 111 P. (2d) 322, 327 (1941):

> ". . . upon death [of the insured] the beneficiary's right becomes *vested.* . . ."

And again, quoting 27 Cal. App. 607, 623:

> "'. . . the interest of the beneficiary designated in the certificate in the benefit fund *becomes vested, eo instanti, upon the death of the assured.*'"

As said in *Pimentel v. Conselho Supremo, etc.*, 6 Cal. (2d) 182, 57 P. (2d) 131, 132 (1936):

> "We are satisfied that the better reasoning supports the rule adopted by our courts, that *the rights of the beneficiary vest immediately upon the death of the insured and cannot thereafter be modified by action of the insurer.* . . ."

trol its interpretation and a determination of the rights of the parties thereunder.[9]

Presumably this rule as to the vesting of a beneficiary's interest and its general application will not be disputed. But its application in the instant case is denied by appellees because of certain provisions of the policy.

It is submitted that none of the provisions of the policy in this case forbid application of this general rule. Moreover, if there were doubt as to the correct interpretation of the policy, such doubt should be resolved in harmony with the general rule that a beneficiary's interest vests upon the death of the insured.

(3) No Provisions of This Policy Forbid Application of the General Rule of Law That a Surviving Beneficiary's Interest Vests Upon the Death of the Insured.

Parts of the policy which appellees have said forbid an application of the general rule are: Paragraph 11 under the heading "General Provisions" [R. 41 *et seq.*], and certain paragraphs under the heading "Special Provisions Relating to Settlement When This Policy Becomes Payable." [R. 45 *et seq.*] Attention is invited to these provisions.

(A) "General Provisions."

Paragraph 11 of the "General Provisions" [R. 43, 44] is relied upon to sustain the judgment. For convenient reference the five sentences comprising paragraph 11, copied below, are designated (as they were in the argu-

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[9]*Mutual Life Co. v. Johnson,* 293 U. S. 335, 339 (1934); *Ruhlin v. N. Y. Life Ins. Co.,* 304 U. S. 202 (1938); *Rosenthal v. N. Y. Life Ins. Co.,* 304 U. S. 263 (1938); *Equitable Life Assur. Soc. v. Arnold,* 27 F. Supp. 360 (Mass., 1939).

ment before the District Court): (A), (B), (C), (D) and (E):

"(A) Subject to the rights of any Assignee, the Insured (1) may designate one or more Direct Beneficiaries if none be named herein, either with or without reservation of the right to revoke such designation; and (2) may designate one or more Contingent Beneficiaries whose interest shall be as expressed in this Policy; and (3) may change any Direct Beneficiary not irrevocably designated; and (4) may change any Contingent Beneficiary.

"(B) If there be more than one Direct Beneficiary the interest of any deceased Direct Beneficiary, including any unpaid benefits due or to become due, shall pass to the surviving Direct Beneficiary or Beneficiaries unless otherwise directed by the Insured with the consent of the Company.

"(C) Upon the death of the last surviving Direct Beneficiary the Contingent Beneficiary or Beneficiaries, if any, shall succeed to the interest of such Direct Beneficiary, including any unpaid benefits due or to become due.

"(D) If no Direct Beneficiary or Contingent Beneficiary survives the Insured the proceeds of this Policy shall be payable to the executors, administrators or assigns of the Insured.

"(E) No such designation, revocation, change or direction shall be effective unless duly made in writing and filed at the Home Office of the Company (accompanied by this Policy) prior to or at the time this Policy shall become payable, and endorsed hereon by the Company."

We contend that the entire paragraph must be deemed to refer to a period ending with the insured's death—not

to a period after the insured's death. We base this contention on the following grounds:

There can be no doubt that sentences (A), (D) *and* (E) *speak of a time at or before the death of the insured,* as distinguished from a period after the insured's death. Obviously the matters referred to in sentence (A) are things which must occur, if at all, before the insured dies. Sentence (E) obviously supplements sentence (A), and likewise refers to matters which must occur, if at all, before the insured dies. Sentence (D) refers to the time of the insured's death, not to a time after the insured's death, for note the words "survives the Insured." This matter (*i.e.,* survivorship) is to be determined as of the date of the insured's death. Thus the sentence describes that which must occur at the date of the insured's death, not at some date thereafter.

Taken separately and divorced from their context, sentences (B) and (C) are not clear. So taken they may refer either to a period before the insured's death, or to a period both before and after the insured's death. We contend for the former construction.

One sentence should not be divorced from its context. The entire paragraph should be construed as a whole. As already pointed out, sentences (A), (D) and (E) unmistakably refer to a period at or prior to the death of the insured. Sentences (B) and (C) should be given the same construction.

As already pointed out, sentence (D) clearly and unmistakably refers to the time of the insured's death—not to something occurring thereafter. But sentences (B), (C) and (D) are obviously intended to cover an *entire series* of possible contingencies, *i.e.,* a case [see (B)] of

several direct beneficiaries and the death of some but not all of such direct beneficiaries; a case [see (C)] where all direct beneficiaries are dead and contingent beneficiaries survive; and [see (D)] a case where all direct beneficiaries and contingent beneficiaries are dead. If, as must be apparent, it was the purpose of these three sentences to cover an *entire series* of possible contingencies, they should be construed as a whole, and it would certainly be a strange construction to make sentences (B) and (C) refer to a period both before and *after* the insured's death, when it is clear that sentence (D) by its terms cannot by any possibility refer to what may happen *after* the insured's death. If all three sentences are construed so as to refer to a time at or prior to the death of the insured—not to a time subsequent thereto—they present a consistent and logical whole. They should be so construed. Clearly sentence (D) does not and cannot refer to what was to occur after the death of the insured. Sentence (D) makes no provision as to what shall happen when *after the death of the insured* all beneficiaries, direct and contingent, are dead. It is quite illogical to suppose that sentences (B) and (C) were intended to cover a period of time not covered by sentence (D), *i.e.,* to make provision for what might happen *after the death of the insured.*

It was not necessary for the draftsman of these sentences to provide therein for what should happen *after the death of the insured.* Since under the law in the absence of express provision to the contrary a beneficiary's interest becomes a vested interest upon the death of the insured, there was no necessity of stating what should happen if one of several direct beneficiaries should die *after the insured's death,* or if all direct beneficiaries should die (leav-

ing only contingent beneficiaries) *after the insured's death,* or if all direct beneficiaries and all contingent beneficiaries should die *after the insured's death.* Since the direct beneficiary's interest would vest *at the insured's death,* there was no need of stating what would happen if such beneficiary should die *thereafter.* The death of one who already has a vested interest will not impair such interest. It becomes a part of his estate. Before the death of the insured, on the other hand, the interest of a beneficiary under this policy could have been no more than a contingent interest. With respect to such interest it was necessary that provision be made as to what should occur in the event that death removed such beneficiary before the interest vested, *i.e.,* before the death of the insured. This was what paragraph 11 of the policy attempted to do, *i.e., deal with contingencies at or prior to the death of the insured.* At the death of the insured the beneficiary's interest became a vested interest. There was no necessity for any statement as to what would happen in the event of the death of a beneficiary after such vesting, for the law provided the answer.

The conclusion is that all of paragraph 11 must be held to refer to matters which may happen at or prior to the death of the insured. Thus sentence (C) stating that "Upon the death of the last surviving Direct Beneficiary the Contingent . . . Beneficiaries . . . shall succeed to the interest of such Direct Beneficiary, including any unpaid benefits due or to become due," must be held to state that which takes place upon the death of the direct beneficiary *prior to the death of the insured.* The reference to "unpaid benefits due" is not inconsistent with this conclusion. During the lifetime of the insured there are benefits due from time to time under the policy, *e.g.,*

dividends payable in cash to the beneficiary or dividend accumulations (see paragraph 9 under the "General Provisions" of the policy.) [R. 42, 43.]

This conclusion (*i.e.,* that all of paragraph 11 must be held to refer to matters which may happen *at or prior to the death of the insured*) is further strengthened by observing that all of the other paragraphs in that section of the policy entitled "General Provisions" which contains paragraph 11 deal with situations and contingencies which must arise, if at all, *at or before the death of the insured.*

Therefore *none of paragraph 11 is applicable here where the death of the sole direct beneficiary occurred after the death of the insured.* There being no policy provision forbidding an application of the usual rule as to the vesting of the beneficiary's interest, such usual rule should be held to be controlling. Upon the death of the insured on November 24, 1944, the surviving direct beneficiary, Genevieve B. Hill, acquired a *vested* interest in the proceeds of the policy. Since this interest was a *vested* one, it became a part of the estate of Genevieve B. Hill when she died on January 2, 1945.[10]

Any other conclusion would disregard the law relating to the vesting of a beneficiary's interest and would dis-

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[10]The fact that the policy in this case provided that the insurance company promised to pay the proceeds of the policy "immediately upon receipt of due proof of the death of the Insured" [R. 39], did not change the date of vesting from the date of the insured's death to the subsequent date when proofs of death were submitted to the company.

> *Staunton v. Provident Life & Acc. Ins. Co.,* 69 Ohio App. 27, 42 N. E. (2d) 687 (1941).

Moreover, in this case the wife, Genevieve B. Hill, died *after* the proofs of death were received by the company.

regard a proper construction of the terms of the policy. *Any other conclusion would make it possible for the insurance company to change the rights of a beneficiary by simply delaying a payment of the proceeds of the policy.*

(B) "SPECIAL PROVISIONS."

Certain paragraphs of the "Special Provisions Relating To Settlement When This Policy Becomes Payable" [R. 45 *et seq.*] are relied upon to sustain the judgment.

These "Special Provisions" obviously embody *a scheme whereby the insurance contract may be continued in effect and operation after the death of the insured,*[11] instead of terminating upon payment of the proceeds in one sum. If these provisions of the policy are not put in operation, then, upon the death of the insured and payment of the proceeds, the policy ceases to function as a contract and must be surrendered and cancelled.

Now, note the provisions of paragraphs 1 and 1a of these "Special Provisions" [R. 45, 46]:

> "1. The Insured shall have the right, with the privilege of change before this Policy becomes payable, to elect payment of the then net proceeds, in whole or in part, under either Option 'A', 'B', 'C', or 'D', or under two or more of said options."
>
> "1a. If when this Policy becomes payable no such election by the Insured is then in force, the Direct Beneficiary or Beneficiaries *may* make such election in lieu of payment in one sum and upon such an election by the Direct Beneficiary or Beneficiaries

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[11]Note that paragraph 13 of these "Special Provisions" states that "During settlement under the Special Provisions this Policy shall remain in the possession of the beneficiary or beneficiaries thereunder" [R. 52].

the interest of any Contingent Beneficiary designated by the Insured shall terminate. The Direct Beneficiary or Beneficiaries may then, subject to change, designate a Contingent Beneficiary or Beneficiaries under the election so made."

The insured in his lifetime made no election with respect to optional benefits under paragraph 1.

Upon the death of the insured, his wife made no election under paragraph 1a. [R. 62.]

But her failure so to do did not waive or forfeit the *right* which she had upon the death of the insured. Her failure so to do did not place her in the position of losing the proceeds of the policy if she should happen to die before they were paid to her by the insurance company.

By paragraph 1a the wife was given an "election." This means that *two* choices must then have been open to her. One of these choices was to do nothing (as she did) and stand upon her right not to continue the policy in effect but to take "payment in one sum." The other choice was to elect to continue the policy in operation and select an optional method of payment. *By the express language* of paragraph 1a she was permitted to select an optional method of payment *"in lieu of payment in one sum."* The words *"in lieu of"* mean "in place of," or "instead of," or "in substitution for."[12] Clearly the wife was granted the right to select an optional method of pay-

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[12]*Rutherford v. Oroville Wyandotte Irr. Dist.*, 218 Cal. 242, 22 P. (2d) 505, 508 (1933); *Mass. Bonding & Ins. Co. v. Rutley Const. Co.*, 159 Misc. 392, 287 N. Y. Sup. 662, 666 (1936); *S. E. Hendricks Co. Inc. v. Thomas Pub. Co.*, 242 Fed. 37, 42 (C. C. A. 2, 1917); *State v. Minneapolis & St. L. R. Co.*, 204 Minn. 250, 283 N. W. 244, 245 (1939).

ment *in substitution for some right she already had.* As said in *Vancleave v. Wolf,* 98 Ind. App. 650, 190 N. E. 371, 372 (1934):

> "'*In lieu of*' implies the existence of something for which a substitution is being made."

What was the right which the wife already had, *"in lieu of"* which she might have elected to continue the policy in operation and avail herself of its optional benefit features?

Since the insured died without electing to put the optional benefit features of the policy in operation, the policy upon his death, in the absence of any act by his wife selecting an optional feature, became payable *"in one sum."* In the absence of some act by his wife, the policy could not continue in operation. There was nothing left for the insurance company to do but to pay over the proceeds "in one sum." The surviving wife had this right upon the insured's death. This was the right *"in lieu of"* which she might have elected to continue the insurance contract in operation for the purpose of availing herself of one of its optional features. She made no such election. She stood upon the right she had when the insured died, *i.e.,* the right to take the proceeds of the policy "in one sum."

Paragraph 1a declares that if the wife had elected to avail herself of the optional features "the interest of any Contingent Beneficiary designated by the Insured shall terminate." The reason for this is found in the next sentence, which reads: "The Direct Beneficiary . . . may then, subject to change, designate a Contingent Beneficiary . . . under the election so made." Thus, if the wife had elected to avail herself of the optional fea-

tures, she would have been empowered to designate a new contingent beneficiary. If the wife had made such election, *the policy would have continued in force and in operation*, and to avoid conflict between the contingent beneficiary *selected by the insured* and a new contingent beneficiary *selected by the wife,* it was natural that any claim by the former should be barred by the clause: ". . . upon such an election . . . the interest of any Contingent Beneficiary *designated by the Insured* shall terminate." The sole purpose of this clause was to clear the way for a free exercise by the wife of her right to select the optional features.

The foregoing demonstrates the impropriety of construing the clause last referred to *as an implication* that *in the absence of such election* by the wife, the interest of the contingent beneficiaries would survive. No such election having been made, the policy did not continue in operation, and the "Special Provisions Relating To Settlement" did not become operative. The situation presented in the instant case was not one falling within the scope or purpose of paragraph 1a.

If the wife had elected to avail herself of the optional features of the policy (which she did not), then the policy would have continued in operation. In such event the clause "upon such election . . . the interest of any Contingent Beneficiary designated by the Insured shall terminate" would have been useful in preventing conflict between a claim by any contingent beneficiaries *selected by the insured* and a claim by contingent beneficiaries *selected by the direct beneficiary*. But such clause may not be availed of as an implication that the interest of the contingent beneficiary survived where no such election was made by the wife and the policy did not continue in operation.

Paragraph 5 of these "Special Provisions" [R. 46, 47] obviously has no application to the facts here presented. Neither the insured nor the direct beneficiary elected to continue the policy in operation after the insured's death by putting any of the option features in operation. Yet *the express language of paragraph 5 clearly makes the paragraph inapplicable where the option features have not been made operative.* Note the language in the first sentence following the word "except" *expressly* referring to the option features.

(C) Authorities.

The following authority on its facts is directly in point, and supports the conclusion that the direct beneficiary, Genevieve B. Hill, at the death of the insured had a vested interest.

In *Chartrand v. Brace,* 16 Colo. 19, 26 Pac. 152 (1891), a policy of insurance on the life of one, Rouse, provided that the proceeds of the policy should "at his death, be paid to his wife, Ella A. Rouse, and, in case of her death, to Mary E., Clara D., and Anna L. Rouse, children." Rouse, the insured, died. His wife, Ella, died within a month thereafter. The proceeds of the policy were claimed by the wife's administrator, also by the children of a former wife of the insured who were the "children" named in the policy as contingent beneficiaries.

In affirming a judgment in favor of the deceased wife's administrator, the court said (26 Pac. at 153):

> "A policy of life insurance is in the nature of a testament, and, although not a testament, in construing it the courts will so far as possible treat it as a will. * * * (26 Pac. at 154): So, in the case at bar, we are of the opinion that, by the express terms

of the policy, the right to the fund became vested in Ella A. Rouse upon the death of her husband. Consequently, upon her death, the fund should pass to the administrator as a part of her estate.

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"If the construction contended for by counsel be adopted, the wife could not use the fund, no matter to what extremity she may have been driven in the final sickness intervening between the death of her natural and legal protector and her own death. She could not, by anticipating the payment of the legacy, surround herself with the things that might have been absolutely necessary to sustain her life from day to day. *In addition to this, it would place the beneficiary primarily entitled to the fund to a great extent within the power of the insurer. For instance, by withholding payment, the beneficiary would be compelled to bring suit for the money, the ultimate decision of which might be delayed for years; and if, during the time, the wife should die, others would receive the reward of her endeavors without sharing the expense. Under such circumstances, it is easily to be seen that the insurance corporation or association could compel the wife in many instances to accept less than the face of the policy, rather than institute a suit, no matter how clear her right of recovery might be.*"

Kottman v. Minnesota Odd Fellows Mut. Ben. Soc., 66 Minn. 88, 68 N. W. 732 (1896)[13] is to the same effect.

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[13]This case was followed in *Free and Accepted Masons v. Johnson*, ... Tex. Civ. App. ......, 56 S. W. (2d) 215, 217 (1932). While the latter involved rights under a certificate issued by a mutual benefit society, it is said that by the weight of authority the rights of a beneficiary under such a certificate do not differ essentially from the rights of a beneficiary under an ordinary life insurance policy. *Modern Woodmen of America v. Headle*, 88 Vt. 37, 90 Atl. 893, 897 (1914).

There the Society issued to one Gazett a certificate stating that it agreed "to pay, within sixty days after notice and satisfactory proofs of the death of said brother, made as provided by the by-laws, to Mrs. Fride Gazett, his wife, if living, if not living then to the heirs or assigns of the aforesaid brother, a sum," etc. Gazett died on November 12, 1894. Six days later, before any proofs of his death had been furnished, his widow, Fride Gazett, died. The administratrix of the widow recovered judgment against the Society for the proceeds of the certificate. In affirming this judgment the court said (68 N. W. at 733):

> "We have no doubt that the words 'if living' and 'if not living' refer to the time of the death of the member, and that the right of the beneficiary became fixed and vested at that date.
>
> *　　*　　*　　*　　*　　*　　*　　*
>
> "*The law always favors vested in preference to contingent estates or interests.* If defendant's contention is correct, then who is or will be the beneficiary will remain incapable of ascertainment until 60 days after proof of death, or, at least, until proof of death. Until that proof is made, no one would have any vested interest in the fund. Who, then, it may be asked, is to furnish the proof of death? The provision requiring proofs of death is designed solely for the protection of the society, and the 60-day clause is also intended exclusively for its benefit, to give it time to collect an assessment from its members. Neither provision has any reference to the question as to who the beneficiary shall be. These provisions being solely for the benefit of the society, it is competent for it to waive them. Suppose in this case the society had waived proofs of death, and paid

over the money to the widow before she died; would it be contended that the society would be liable to pay a second time to the heirs of Gazett? We fail to see why it would not be if defendant's construction of the certificate is to obtain. *Any such construction is also subject to the serious objection that it leaves the determination of the question who the beneficiary shall be subject to be manipulated and changed by the conduct of the parties after the death of the member, as, for example, by expediting or delaying the furnishing of proofs of death.* We hold that the widow's right to the fund became vested at the date of the death of her husband, and that right was not divested by her subsequent death before proofs of death had been made."

The decision in *Northwestern Mut. Life Ins. Co. v. Fink*, 118 F. (2d) 761 (C. C. A. 6, 1941), is not opposed to our contentions.

The *Fink* case arose upon a Northwestern policy somewhat similar to the policy in the instant case. Such policy did not on its face name any beneficiary, but the insured had made the following "designation":

> "I, Edwin A. Wolf, the insured . . . hereby designate Charlotte Wolf and Florence W. Gage, wife and sister, as direct beneficiaries under said policy, share and share alike. In the event of the death of Charlotte Wolf, such share as she would have been *entitled to receive* shall be payable to Virginia C. Wolf and Edwin Wolf, Jr., share and share alike, or to the survivor of them."

There is nothing resembling this "designation" in the instant case. The policy here involved contains nothing of

the sort. The paper designating Genevieve B. Hill simply designates her "as direct beneficiary." In a separate paper, bearing the same date, the Hill children are designated "as contingent beneficiary." Neither paper says anything about what will happen in the event of the death of the direct beneficiary.

In the *Fink* case the direct beneficiary, Charlotte Wolf, died twenty-four hours after the insured. It was held that the one-half interest in the policy which Charlotte Wolf would have taken if living passed to Virginia C. Wolf and Edwin Wolf, Jr. The latter had already been paid by the insurance company, so any other conclusion would have required the insurance company to pay again on the same policy.

The court, in reaching this conclusion, relied solely upon the "designation" (quoted above) which the court said "must be read as a whole" (118 F. (2d) at 763). Clearly the court did not base its conclusion upon paragraph 11 of the policy.

Obviously this "designation" in the *Fink* case spoke of a period *after* the insured's death. It stated that if Charlotte Wolf (the direct beneficiary) died, "such share *as she would have been entitled to receive shall be payable*" to Virginia and Edwin. But until the death of the insured, Charlotte was not and could not have been *"entitled"* to receive anything, for the policy reserved to the insured the right to change beneficiaries. Under the law (see authorities hereinbefore referred to) this gave the direct beneficiary merely an expectancy prior to the in-

sured's death. Until that time she was not *"entitled"* to anything. Hence when this "designation," in connection with Charlotte's death, referred to "such share as she would have been *entitled* to receive," it obviously was speaking of her death after she was *"entitled"* to something, *i.e.,* to her death at a date *after* the death of the insured. Accordingly it is not strange that this "designation" (which has no counterpart in the case at bar) was held to govern a distribution of the proceeds of the policy upon the death of the beneficiary *subsequent* to the death of the insured.

In the case at bar there was no such "designation." Neither the paper which designated the direct beneficiary [R. 55], nor that which designated the contingent beneficiaries [R. 58], nor the policy (paragraph 11) provided for what should happen upon the death of the direct beneficiary *after* the death of the insured. Hence there was nothing to repel an application of the usual rule of law, that upon the death of the insured the interest of the beneficiary becomes a vested interest.

The court mentions another reason for its decision in the *Fink* case, viz., that the direct beneficiary in that case died before she had "perfected" her right to receive the proceeds of the policy, *i.e.,* died before proof of the insured's death was filed with the company (118 F. (2d) at 763). In the instant case, on the other hand, proof of death was made and filed with the company and the policy by its terms had become payable before the death of the direct beneficiary occurred. This is an additional ground for distinguishing the *Fink* case.

II.

The District Court Erred in Finding That It Was Insured's Intention to Financially Provide for and Protect by the Policy His Children Rather Than the Creditors, Heirs or Legatees of the Estate of His Wife if She Should Survive the Insured but Die Before Receiving the Proceeds of the Policy.

The District Court found as a fact that:

> "It was the intention of Mr. Hill, the insured, as indicated by the provisions of the said policy and the *surrounding circumstances* under which the policy was issued and the *surrounding circumstances* at the time of the said change of Direct Beneficiary and the designation of the said three children as Contingent Beneficiaries to financially provide for and protect his widow during her lifetime and next his own children, rather than the creditors, heirs or legatees of the estate of his widow if she should survive the insured and then die before receiving the benefits due or to become due under the said policy." [R. 27.]

The District Court in its memorandum entitled "Conclusions of the Court" said:

> "*To more certainly evaluate the meaning of the policy* in suit as it pertains to those named therein as beneficiaries, consideration should be given to the insured's natural propensity to financially provide for and protect his widow during her lifetime, and, next, his own children, rather than her relations or creditors. He unmistakably manifested this attitude by primarily naming his children as sole beneficiaries of

the policy, and upon realizing later conjugal obligations, substituting his wife as direct beneficiary but still regardful of his children's welfare also, he simultaneously named them contingent beneficiaries." [R. 19.]

Thus, in interpreting, or, as the District Court says "to more certainly evaluate the meaning of," the policy a finding as to the insured's *actual intent* is thrown into the scales against appellants. It is true that the District Court also expressed the opinion that the terms of the policy itself warranted a conclusion adverse to the appellants. [R. 20.] Nevertheless, since this finding as to the insured's *actual intent* is stated in order to "more certainly evaluate the meaning of the policy," it must have had potency in influencing the District Court's interpretation of its provisions.

This finding was wholly unsupported by the evidence. It rests solely upon conjecture.

It appears that the policy as originally issued on December 2, 1942, named the insured's children as sole beneficiaries. [R. 39.] On January 26, 1944, the insured changed the beneficiary designation so as to make his wife the direct beneficiary and his children the contingent beneficiaries. [R. 55, 58.] *There was no evidence disclosing the reason for this change. The record does not disclose any of the "surrounding circumstances" referred to in this finding.*[14]

---

[14]The trial proceedings, except for argument, were very brief, and have been printed in full in the Transcript of Record, pp. 37, 38, 62, 63, 64, 65 and 66. The only other facts before the District Court were those found in the statement of fact [R. 36b], and the admissions of the pleadings.

To find that this change was made by the insured to make the policy financially provide for and protect his children if his wife should survive him but die before receiving the proceeds of the policy, was to assume facts and conditions of which there was not the slightest hint in the evidence. An inference of fact must at least have a predicate in fact. The change of beneficiaries in 1944 may just as naturally be attributed to a desire that insured's wife should have the proceeds of the policy if she survived him, as to a desire that she should have such proceeds *only if she survived him long enough to receive them.*

Moreover, it seems to be conceded that the wife would have been entitled to the proceeds of the policy if she had made an election under paragraph 1a of the "Special Provisions." Yet this is wholly inconsistent with the supposed intent of the insured as stated in this finding. The finding states that it was insured's intent to protect his children if his wife died before receiving the proceeds of the policy. This could not have been his intent because under the policy, even if the wife died before the proceeds were paid, the same would pass to her estate for the benefit of her creditors, heirs or legatees if, after the insured's death but prior to her death she had made the election under paragraph 1a. It could not have been the insured's intent that his wife should take the proceeds of the policy only if she survived him long enough to receive them from the company, for the policy itself provided her with a ready means of defeating such intent by immediately upon the insured's death electing an optional benefit feature under paragraph 1a [R. 45, 46] thereby terminating (according to the express language of paragraph 1a) the interest of the contingent beneficiaries.

The District Court's finding as to the insured's *"intention . . . as indicated by . . . the surrounding circumstances* under which the policy was issued and the *surrounding circumstances* at the time of said change of Direct Beneficiary" was wholly without evidentiary support, and must be disregarded.

It was not the intent of the insured to give his wife the proceeds of the policy (a) only *if she survived him long enough to receive such proceeds from the company,* and (b) only *if she failed to take action under paragraph 1a before she died.*

The insured's intent was that his wife should have a vested right to the proceeds if she survived him, such right to be unaffected by the promptness of the insurance company in paying the policy, or by his wife's affirmative action after his death.

It is respectfully submitted that the judgment of the District Court should be reversed and the proceeds of the policy awarded to the executors of the estate of Genevieve Borlini Hill, deceased.

April 17, 1946.

Lawler, Felix & Hall,

John M. Hall,

Attorneys for Appellants, Victor H. Rossetti and Frank P. Doherty, Co-executors of the Estate of Genevieve Borlini Hill.

No. 11235.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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Appellants,

vs.

PETER S. HILL, JOANNE HILL, also known as Joan A. Hill, PATRICIA HILL HARDER and THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,

Appellees.

APPELLEES' BRIEF.

RICHARD H. FORSTER and
CHAUNCEY E. SNOW,
530 West Sixth Street, Los Angeles 14,
Attorneys for Appellees, Peter B. Hill, Joanne Hill, also known as Joan A. Hill and Virginia Hill Harder.

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PAUL P. O'BRIEN

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APPELLEES' BRIEF.

As an introduction to appellees' brief we adopt the memorandum entitled Conclusions of the Court written by Judge Paul J. McCormick in arriving at the decision from which this appeal was taken. This memorandum is set out in full in the transcript of record [R. 16 to 22]. The part which we adopt in this brief is as follows:

> "The question for decision is whether the proceeds of the policy should go to the widow's estate or to the contingent beneficiaries, namely, the children of the insured by a former marriage.
>
> "The contract of insurance under consideration was negotiated for and delivered in the State of Cali-

fornia. Under such facts the policy must be interpreted and the rights of the claimants to the benefits due or to become due under the terms of the policy will be governed by the law of the State of California.

Mutual Life Co. v. Johnson, 293 U. S. 335;

Ruhlin v. New York Life Ins Co., 304 U. S. 202;

Rosenthal v. New York Life Ins. Co., 304 U. S. 263.

"The terms and provisions of the policy in suit constitute the measuring rod or denominator by which the court is to determine the rightful claimant to the amount now on deposit in the registry. See Section 10111, Insurance Code of the State of California.

"The court must ascertain the intention of the insured gleaned from all parts of the policy read as a whole and reasonably and normally considered any material alteration of the writing. If then the policy is clear in expressing the intention of the insured as to whom and in what manner persons designated by him shall succeed to the benefits of the policy, the court is bound to effectuate the insured's expressed purpose by deciding the case accordingly.

Northwestern Mutual Life Insurance Co. v. Fink (C. C. A. 6, 1941), 118 F. (2d) 761.

"Preliminary to examining the policy the undisputed facts of the case should be stated. They are as follows: Under date of December 2, 1924, the Northwestern Mutual Life Insurance Company duly issued its policy for $10,000.00 on the life of George A. Hill, Jr. The policy gave the insured the right to change beneficiaries and also provided for the

right of the insured to designate both direct and contingent beneficiaries at his option and choice. The policy when issued to Mr. Hill contained the designation of 'his children Peter B., Joanne and Patricia Hill the direct beneficiaries, share and share alike, the survivors or survivor.' There was no other beneficiary named in the policy at the initial issuance of it. Subsequently, under date of January 26, 1944, Mr. Hill changed the direct beneficiary from his children to 'Genevieve B. Hill, wife,' and under the same date designated as contingent beneficiaries 'Peter B. Hill, Joanne Hill and Patricia Hill Harder, children, share and share alike, the survivors or survivor.' Hill the insured, died on November 24, 1944. Due proof of his death was submitted to and received by the plaintiff insurance company. Thereafter, on January 2, 1945, the widow, Genevieve B. Hill, direct beneficiary, died without having made any election under paragraph 1a of the 'special provisions' set out in the policy. This paragraph which follows another, whereby the insured is given the right before the policy becomes payable to elect payment of the then net proceeds under options specified in the policy read:

"**Privileges of Direct Beneficiary.** 1a. If when this policy becomes payable no such election by the Insured is then in force, the Direct Beneficiary or Beneficiaries may make such election in lieu of payment in one sum and upon such an election by the Direct Beneficiary or Beneficiaries the interest of any Contingent Beneficiary designated by the Insured shall terminate. The Direct Beneficary or Beneficaries may then, subject to change, designate a Contingent Beneficiary or Beneficiaries under the election so made.

"The executors of Mrs. Hill's estate earnestly argue that parts of the policy, including paragraph 1a, which are specified under the caption 'Special provisions relating to settlement when this policy becomes payable,' have no application to the situation presented in this case. We cannot agree with such contention.

"It is obvious that the policy matures and therefore 'becomes payable' upon the death of the insured. However, the payments are to be made to such beneficiaries and in such manner as to carry out the intention of the insured as expressed in the policy under consideration. Paragraph 1a provides ways by which 'the interest of any contingent beneficiary designated by the insured shall terminate.' These quoted words connote an interest of the contingent beneficiaries, i. e,, the children of the insured after the death of the insured under the situation which the undisputed evidence in this action discloses.

"But the interest of the 'Hill children' in the benefits of the policy due or to become due upon the death of the insured is not to be determined solely from the 'Special provisions relating to settlement when this policy becomes payable.'

"To more certainly evaluate the meaning of the policy in suit as it pertains to those named therein as beneficiaries, consideration should be given to the insured's natural propensity to financially provide for and protect his widow during her lifetime, and, next his own children, rather than her relations or creditors. He unmistakably manifested this attitude by primarily naming his children as sole beneficiaries of the policy, and upon realizing later conjugal obligations, substituting his wife as direct beneficiary but still regardful of his children's welfare also, he simultaneously named them contingent beneficiaries.

"But we are not left to inferences from the policy in concluding that the intention of the insured was to confine all unpaid benefits of the insurance contract to his wife firstly, and to his children if it became impossible because of her death for her to receive any such benefits. The clearly expressed terms of the policy warrant no other conclusion.

"Paragraph 11 of the 'General Provisions' of the policy is a lengthy statement which relates to and deals with several distinct features of the contract of insurance in controversy and is for convenient reference in the memorandum filed by the executors of the estate of Genevieve B. Hill restated as Sentences (A), (B), (C), (D) and (E). The executors contend that the entire paragraph 11 must be deemed to refer to a period ending with the insured's death —not to a period after the insured's death. We think such contention untenable upon analysis of the several subject matters contained in Paragraph 11. We are also of the opinion that all the sentences in Paragraph 11 have no necessary contextual meaning.

"Sentence (E) has no application to the situation before us in this action and may be left out of consideration as immaterial. Sentence (A) is material here only in that it provides in '(2)' that the interest of contingent beneficiaries shall be as expressed in the policy. Sentences (B), (C) and (D) all relate to payments of benefits, but each of such sentences deals with specific and separate actualities. (B) is immaterial to this controversy as there is only one direct beneficiary in the policy in suit. Likewise (D) is of no effect in this action, but Sentence (C) is not only applicable to the situation before us, but clearly and conclusively determines the right of the 'Hill Children' to the unpaid benefits of the policy now in the registry of the court.

"So-called Sentence (C) of the policy in suit is as follows:

> '(C) Upon the death of the last surviving Direct Beneficiary the Contingent Beneficiary or Beneficiaries, if any, shall succeed to the interest of such Direct Beneficiary, including any unpaid benefits due or to become due.'

"It is clear that this requirement reads directly and unequivocally upon the admitted and established situation before us in this action. Mrs. Hill was the last surviving direct beneficiary, and not having received during her lifetime the unpaid benefits due under the policy, the contingent beneficiaries, to-wit, the three 'Hill Children' succeed to the unpaid benefits of the policy, which is the money remaining in the registry in this action.

"There is nothing in any part of the policy in suit which can militate against our conclusion as to the decisive effect of Sentence (C) upon the situation before us in this action. On the contrary, the provisions of Paragraph 5 of the 'Special Provisions Relating to Settlement when this Policy becomes Payable' are substantially identical with Sentence (C) of Paragraph 11 of the 'General Provisions' of the policy and strengthen the accuracy of our conclusions in this case.

"We think that under the terms and provisions of the policy in suit and in the light of the admitted facts and circumstances in proof in this action, the contingent beneficiaries and not the testamentary representatives of the deceased person who in her lifetime was the direct beneficiary in the contract of insurance are entitled to share and share alike to an award of the money deposited by the plaintiff insurance company in satisfaction of Policy No. 3204489

of the Northwestern Mutual Life Insurance Company.

"The rights of the direct beneficiary upon the death of the insured are not to be ascertained or determined by fixed abstract rules which are not applicable to the factual situation before the court in the consideration of the specific contractual obligation in controversy, and for that reason many of the authorities cited in the memorandum of the executors have no application in the case at bar."

At the risk of appearing as an anti-climax to Judge McCormick's statement of the facts and law we desire to add certain comments on the points raised in the appeal.

Intention of the Insured to Govern.

The solution of this contest will be the determination through legal channels of the intention of Mr. Hill, the insured, and the judgment of the court will determine whether his intention is that the proceeds go to the children of the insured or through the estate of the wife to her creditors, heirs, or legatees.

The ideal procedure for determining the intention of Mr. Hill would be to ask him. Obviously this is impossible but the problem can, in our opinion, be clarified by asking the question, if it were possible, as follows:

"Mr. Hill, you have earned and paid for an insurance policy, the proceeds of which amount to $10,060.10, and are now in the registry of this court. Your wife, Genevieve B. Hill, has passed on and has no further need of the money. During her lifetime after your decease you gave her the power to terminate any interest of your children in the proceeds of the policy and to designate anyone whom she might choose, whether known or unknown to you, to take

> the proceeds if she did not receive them personally. This she did not elect to do but left the proceeds of the policy to be paid in the manner provided by you in the policy. Do you now intend that the proceeds be paid to your children or to parties either known or unknown to you through your wife's estate?"

In searching for the intention of Mr. Hill, the insured, the court will of course, look to the policy of insurance, all parts of which should be read together, due consideration given to every part, every part interpreted to give it a reasonable meaning in the setting of surrounding circumstances, and all the other rules of interpretation followed with which the court is adequately familiar. We can only add that the instrument should be construed liberally, and should be given the broad interpretation followed in instruments of testamentary character, and, if any doubt exists as to intention, that interpretation followed which would favor the natural inclination of the insured to provide for his own children before strangers.

> *Chartrand v. Brace* (1891), 16 Colo. 19, 26 Pac. 152, and *infra.*

Before considering the specific arguments in the appellants' brief may we point out that under no argument could there be a question regarding the disposition of proceeds if the insured during his lifetime had made an election under one of the four options available in the policy. (Special Provisions 1 [R. 45, 46].) The language is so clear that "he who runs can read," and see that the Direct Beneficiary would take such benefits under these options as would have been paid to her during her lifetime and that thereafter the remaining benefits would be paid to the children. (Special Provisions 5 [R. 46, 47].) This plan of distribution was adopted by Mr. Hill in the event

he should select one of these option plans, and there is no language in the policy which would even suggest an entirely different plan of distribution if he chose to have the cash paid in one lump sum. We can see no logic whatever to argue that the remaining benefits after the death of the wife, if payable in installments, would go to Mr. Hill's children, whereas the remaining benefits, if paid in one installment, would go to strangers taking through the wife's estate. Therefore, the whole policy should be construed under this basic plan and the benefits unpaid upon death of the wife paid to the three children.

Answer to Point (1) of Appellants' Brief.

We now intend to answer specifically some of the points and statements made in appellants' opening brief.

Starting at the top of page 6 under paragraph (1) the statement is made, "The policy obligated the insurance company to pay immediately upon the death of the insured." This is not true. As indicated by the policy itself [R. 39] and as admitted by appellants later on page 6, the promise is to pay the proceeds "immediately upon receipt of due proof of the death of the insured." The Special Provisions [R. 45] do not change this obligation of the company but permits the insured or the direct beneficiary to elect various schedules for receiving the money from the insurance company.

It is true that in order to make such payment there not only had to be someone ascertainable at that time, i.e., the time of payment, but there had to actually be some beneficiary designated by the policy to receive such payment. If the direct beneficiary was not living at the time of payment the contingent beneficiaries named in the policy succeeded to the interest of the direct beneficiary including

any unpaid benefits due or to become due. [See paragraph 11 of the policy, R. 43.]

If the interpretation of the appellants were followed literally the policy contract would be impossible of performance by immediate payment if the direct beneficiary were deceased when the proof of death was received because steps would have to be taken to ascertain by court procedure the personal representative, heirs, or legatees of the direct beneficiary before payment could be made. The argument of appellants that someone must be "immediately identified" upon receipt of proof of death will disclose its fallacy as we consider the situation if the direct beneficiary should die after the insured but *before* receipt of proof of the insured's death by the company. Under appellants' interpretation of the policy no one could be identified to receive the benefits of the policy because the direct beneficiary would be deceased and no on else identified to receive the benefits.

This problem of identifying the person to receive benefits of the policy at time of payment is not difficult for the company if one of the settlement options is elected by the insured. The appellants will probably admit that the direct beneficiary would have been entitled to receive only such payments as would be made to her during her lifetime and that upon her decease the balance would be paid to the contingent beneficiaries. [See policy General Provisions, paragraph 11, R. 43, and Special Provisions, paragraph 5, R. 46.] In such an event any check forwarding installments must be endorsed by the direct beneficiary in person. If the direct beneficiary is not living to

endorse the check it must be cancelled and a new check written out to the contingent beneficiary who, under the policy, succeeds to the interest of the direct beneficiary upon her decease including all benefits due or to become due.

Is there any logical distinction to be drawn between a payment of proceeds to be made in one lump sum if option settlements are not elected and payments to be made in one installment or in many, if payments are to be made under option settlements? Since the provisions, even as admitted by the appellants are the same in both the General Provisions, paragraph 11, and Special Provisions, paragraph 5, of the policy [R. 43 and R. 46], is is not logical that one consistent plan and program is intended for the payment of all benefits and proceeds of the policy rather than one program for a single payment of the proceeds and a different program for the payment in installments?

We take exception to appellants' statement at the bottom of page 6 regarding surrounding circumstances. There are certain surrounding circumstances which will be referred to later in this brief.

The appellants are begging the question when they state on the top of page 7 that the contract shows a clear and definite intent that the proceeds of the policy shall be paid immediately upon due proof of death to the insured's widow. That is the question around which we have this law suit. The conclusion of the appellees is that the language of the policy expresses the intent, which is: that upon the decease of the direct beneficiary (the wife) the children of the insured succeed to all benefits due or to become due. The only right which the direct beneficiary has is to personally receive the proceeds paid to her while

she is living. There is no intent or right under the policy to have the unpaid benefits paid to the creditors, heirs or legatees of the wife. There is no allegation in this case that the insurance company fraudulently delayed payment of the claim. The simple fact is that the wife did not survive long enough to personally receive the proceeds of the policy, in which event the insured directed that the proceeds should go to his own children.

The whole argument in Point (1) overlooks the provision of the policy and the intent of the insured that the beneficiaries to take the proceeds were very definite and easily ascertainable, namely, the widow if she were living at the time of payment and if not the named children of the insured.

Answer to Point (2) of Appellants' Brief.

Point 2 on page 9 of appellants' brief discusses the rule of vesting in the beneficiary or beneficiaries upon the death of the insured. We take no exception to this statement of law and agree that it does so vest. This rule of law, however, and all of the cases cited in appellants' brief under this point relate to the rule of vesting when the contest is between a beneficiary and a purported assignee or the personal representative of the insured. Not one of the cases relates to the respective rights between the direct and contingent beneficiaries. It should be pointed out that a contingent beneficiary is also a beneficiary under this rule. The vesting rule settles the rights of both the direct and contingent beneficiaries as against the estate of the insured or any purported assignee of the policy of claimants under an uncompleted assignment or change of beneficiary. Upon the death of the insured the rights of both the wife (the direct beneficiary) and the children (the

contingent beneficiaries) became vested or fixed. These rights were that the wife should take the payments made to her during her life and that upon her decease the children should succeed to the balance of the benefits due or to become due.

This is the only statement of the rule of vesting which will explain the legal situation existing under this policy if the insured elects to have payments made under the option settlement installment plan. Obviously the appellants should not then try to apply this rule so as to give the wife (the direct beneficiary) all of the proceeds of the policy, including installments after her decease, under the argument that upon the death of the insured the rights of the direct beneficiary became "vested" in her alone and, therefore, upon her death these "vested" rights pass on to her estate so that the contingent beneficiaries would lose all benefits. The argument of vesting is just as erroneously applied in an attempt to deprive the children of their rights under the policy when there is no election of the option settlement.

Answer to Point (3) of Appellants' Brief.

A. General Provisions.

Section (3) of appellant's brief on page 13 discusses the essential point in this law suit, namely, the interpretation of the sentence designated in the brief as (C) of paragraph 11 of the General Provisions of the policy [R. 43 and R. 44]. Appellants seek to interpret this paragraph by having the court change the wording, inserting the words "prior to the death of the insured" to make sentence C read as follows, "C. Upon the death of the last surviving direct beneficiary (prior to the death of the insured) the contingent beneficiary or beneficiaries, if any, shall

succeed to the interest of such direct beneficiaries including any unpaid benefits due or to become due." If the court had the power to do so and desired to change the meaning of this sentence by such an insertion the contention of the appellants would have some support. If this were done, however, it would make a very poorly drafted document. As appellants state on page 15, at the bottom of the page, all of paragraph 11 should be construed as a whole as it is intended to cover an "entire series" of possible contingencies. However, using the interpretation of the appellants, paragraphs B and C would be limited in their application to contingencies prior to the death of insured only and would leave the whole matter of contingencies after the death of the insured without any coverage by the policy. It hardly seems likely that a document as carefully drawn as a life insurance policy by the Northwestern Mutual Life Insurance Company would show such gross carelessness. Certainly a strained argument attempting to read into the sentence what it does not contain should not be indulged in by the court to bring about such a glaring instance of poor draftsmanship.

On the other hand, if the sentence is construed to mean exactly what it says it will provide for the disposition of any unpaid benefits due or to become due upon the death of the last surviving direct beneficiary. This obviously is not limited by the wording to any special period either before or after the death of the insured but is general and refers to the death of the surviving direct beneficiary whenever it occurs. It is obviously the intention of the

insured, in accepting this policy, that it would be interpreted in accordance with the plain meaning of its language. We submit that it is very doubtful that the insured or anyone with less than a special skill in law could follow out the arguments of interpretation as set forth in section (3) of the appellants' brief. Since it is the intent of the insured which the court is attempting to discover the court should take the plain, ordinary and obvious meaning of the sentence as it would be understood by an ordinary layman and refrain from adopting circuitous reasoning to give it a meaning not included on its face. It is plain from reading at the bottom of page 17 of the appellants' brief that the attempt is made to insert in this sentence the words "prior to the death of the insured," which words are put in italics in the brief. For authority that the court cannot and will not change the plain language of the policy by inserting words not already in it to change its meaning we have only to refer to an almost identical situation in the case of *Northwestern Mutual Life Insurance Company v. Fink,* 118 F. (2d) 761 (C. C. A. 6, 1943), which will be more specifically referred to later in this brief.

On page 15 of the brief, appellants make the following statement: "Taken separately and divorced from their context, sentences (B) and (C) are not clear. So taken they may refer either to a period before the insured's death, or to a period both before and after the insured's death." This, we submit, is a very fair and proper statement of the real meaning of sentence (C). As stated by appellants the language may refer to a period *before* the insured's death or to a period both *before and after* the insured's death. It will be noticed that this analysis makes the second interpretation include the first. In other words, the interpretation of both "before and after" includes the

interpretation of "before". Therefore, the issue does not involve opposed interpretations but is merely a question of whether the plain and simple statement of the sentence is to be narrowed, restricted and cut down to a partial application of its full meaning. Since the wording in sentence (C) "upon the death of the last surviving direct beneficiary" would naturally refer to the time of the death of the last surviving direct beneficiary what reason can there be for changing this meaning and limiting it to the death of the direct beneficiary within a certain prescribed time limit. Certainly this should not be done unless there is some wording in the policy which indicates an intention to do this. There is nothing in appellants' brief which indicates that any wording of the policy suggests such a narrow meaning. The only argument is that because it is in proximity to other sentences which are by their own specific wording limited to a narrow period of time, automatically sentence (C) becomes also narrowed. If there are several marbles adjacent to each other and one of them is black we would hardly be justified in concluding the other adjoining marbles are black because they happen to be adjacent or contextual. Is it not a more logical method to look at the marbles and see that some are black and others white?

Apart from the fallacy of this contextual argument there is no more justification for limiting the meaning of sentence (C), which clearly includes both *before and after* the insured's death to refer only to a period before death than there would be in interpreting the word "cow" used in a sentence to mean only "black cow."

B. Special Provisions.

It is apparently true that the Special Provisions as stated in appellants' brief, page 19, "embody a scheme whereby the insurance contract may be continued in effect and operation after the death of the insured" and by this admission and the obvious meaning of the Special Provisions themselves it is intended to refer to a time *after* the death of the insured. In fact the very heading confirms this view. "Special Provisions relating to settlement when this policy become payable" must refer to a time after the death of the insured, because until that event the policy does not become payable.

We are, therefore, seeking the intent of the insured in including these provisions. It is apparent that paragraph 1a indicates that the insured was thinking of a time after his decease because he provides that if he himself has made no election prior to his decease then after his decease the direct beneficiary may make such an election. He states that upon the direct beneficiary making such an election the interest of the contingent beneficiaries, whom he has designated, *shall terminate.* It would hardly seem necessary to state that the interest of contingent beneficiaries at a time after his death should at such time terminate if he had intended that such interest would terminate at his death. This indicates clearly that he intended that the interest of the contingent beneficiaries, i.e., the right to take any benefits not actually paid to the direct beneficiary in person, would continue unless the wife should exercise the power, which he had granted to her,

to terminate this interest by an election. He then proceeds to give the direct beneficiary an additional power, i.e., after terminating the interest of the contingent beneficiaries by her election she may make a second election and determine whether the proceeds of the policy should go to her own estate or to persons whom she might designate to take directly from the insurance company upon her death. It is apparent that she could not exercise this second power, that is to designate other contingent beneficiaries, until she had first terminated the continuing interest of the contingent beneficiaries designated by the insured, through the procedure of an election.

It must be presumed that the wife knew her rights as set out in the policy and knew that she had the power by an election to terminate the interest of the insured's children so that the proceeds and benefits of the policy, if she did not survive long enough to collect them, would then go to her estate. Her failure to exercise this power and make such an election would give rise to the inference that, in accordance with the intent of the insured, she wished his children to take any proceeds which she herself might not receive.

The appellants in their argument on page 21 are again begging the whole question when they state that the surviving wife, upon the death of the insured, had the right to receive the proceeds "in one sum." According to the plain provisions of the policy her right upon the death of the insured was to receive such payments as were *actually made to her in her lifetime* because upon her death all unpaid benefits due or to become due would pass by succession to the contingent beneficiaries.

C. Authorities.

The case of *Chartrand v. Brace,* 16 Colo. 19, 26 Pac. 152 (1891), is referred to in appellants' brief. As is indicated by well recognized authorities, there is little value to be gained from the interpretation of documents not similar to the one in dispute. The contract referred to in the *Chartrand v. Brace* case was not similar to the present policy in the *Hill* case. None of the paragraphs indicating intent of the insured, discussed and referred to in the foregoing pages of this brief, were there included. As stated in appellants' brief, page 25, the Chartrand policy provided that the proceeds of the policy "at his death should be paid to his wife . . . and in case of her death to . . . his children." Such provision does not state that "upon the death of the wife the children shall succeed to any unpaid benefits due or to become due." The court reasoned that "in case of her death" must refer to a condition existing at the date of the death of the insured, otherwise the provision would have no meaning. The court, therefore, concluded that "in case of her death" meant if she were dead at the date of insured's death the proceeds of the policy would be paid to the children. Since she was not dead at that time naturally the proceeds in accordance with directions of the insured should be paid to her or to her estate. No provision was included in the policy under which the children could take if she died at a subsequent time.

This, however, is not the situation in the present case. Our policy states that "upon the death of the direct beneficiary the contingent beneficiaries shall succeed to the interest of such direct beneficiary" [R. 43, 44]. This is a direct provision for succession to the wife's interest

whenever she died and by its express terms gives any benefits of the policy still in the possession of the insurance company to the children.

That part of the quotation from the case set out in italics on page 24 of appellants' brief does not apply to the type of policy now before the court in the *Hill* case. Apparently the insurance company has profited by experience and court cases since the date of the *Chartrand v. Brace* case in 1891. It might be noted that the policy in the *Hill* case was dated in 1942. In drafting the present policy the company not only used a wording which avoids the construction in the *Chartrand* case but also sets up a provision which will make the possibility cited in italics impossible. If there were any suggestion that the Northwestern Mutual Life Insurance Company had followed or threatened to follow the practice there set out of improperly delaying payment (and there is no such suggestion in this case) the wife has adequate protection by exercising the election set out in paragraph 1a of the Special Provisions. She could immediately and at any time after the death of the insured, if she so desired, by an election assure herself and her estate of getting all of the proceeds no matter how long payment might be delayed. By this simple process of making an election to take under option A of the policy she could terminate the interest of the contingent beneficiaries, set the proceeds of the policy up at a fixed interest rate and having done so be entitled to take the proceeds of the insurance policy whenever she so desired during her life or leave them so that her personal representative could collect them after her death.

While the actual interpretation of a different contract in another case is of little value if cited as a specific interpretation for the contract under discussion, yet the

general rules of interpretation and construction referred to can be of definite assistance. We point out at this time that even in the *Chartrand* case with its language which indicates an interpretation leaving the proceeds to the estate of the wife, the three judges of the court at the first hearing decided unanimously in favor of the children. After rehearing two of the judges decided in favor of the estate of the wife, while the third dissented in favor of the children.

Some of the general rules of construction stated in this case are so fundamental and have had such universal acceptance that we set them forth for the guidance of the court in the present case.

> "While the certificate is to be construed as a contract, nevertheless, it being in the nature of a policy of insurance, a post mortem provision for the benefit of those dependent upon the assured for support, it is, like the provisions of a will, to be liberally construed in favor of those who may naturally be presumed to have been the objects of their father's bounty. In order to correctly understand and give effect to the contract over which this controversy has arisen, certain rules for the interpretation and construction of written instruments will be noticed. Primarily to be considered is the intention of the husband and father in effecting the insurance, and this is to be ascertained from the language of the certificate itself, construing its words according to their common and reasonable signification, so as to give effect to the entire instrument as far as practicable; secondly, the language of the instrument is to be construed in the light of extrinsic circumstances attending its execution, considering the situation and rela-

tions in life of the several parties therein mentioned, and the objects and interests to be thereby secured."

"But it is scarcely necessary to invoke cumulative authority to confirm the view that it was the father's intention, in case of his wife's death, that the insurance money should go to his doubly orphaned minor children, instead of the administrator of the deceased wife, either for the payment of her debts, or for the benefit of her heirs, who were to him as strangers, having no special claim upon his fortune, his benevolence, or the fruits of his labor."

Henry v. Thomas, 118 Ind. 27, 20 N. E. Rep. 519.

"Words might have been inserted in the certificate providing for the payment of the insurance to the children only in the contingency of the wife's death before the death of the assured. If such words had been inserted, they would necessarily have controlled the interpretation of the instrument. But such words were not inserted, and they certainly should not be supplied by implication, when, from all the facts and circumstances legitimate to be considered in construing the instrument, the obvious effect of supplying them, as contended by appellee, would be to defeat, not to effectuate, the intention of the assured."

"But the contention is that a certain 'formula of words' used in the certificate has been construed by the courts to have a certain and definite signification, and that this court should feel itself bound by such precedents. As heretofore shown, no case has been cited in which the language was 'precisely analogous' or 'strictly identical' with the certificate under consideration; nor has any case been cited where the circumstances and relation of the parties to be affected by the instrument were either precisely or substantially analogous to those under consideration. It has

been before observed, and it can scarcely be made clearer by repetition, that the courts, specially the American courts, will not allow themselves to become slaves to 'arbitrary and unbending' precedents, when the effect of such servility is to do manifest injustice. But they will rather 'grapple with the difficulties which present themselves, however formidable and embarrassing,' in each particular case, and determine the same with reference to its 'peculiar circumstances,' placing the decision 'upon the proper basis of truth and justice, without regard to the entire want of precedent.' 1 Redf. Wills, *supra.* The law is not, and in the nature of things cannot be, an exact science, like mathematics. Long ago able jurists gave up the idea of formulating specific rules adapted to the exigencies of each particular case. At the best, the law is but a rational science, founded on general principles of right and justice. Experience has shown that these principles, when intelligently and conscientiously applied, insure substantial justice in the larger proportion of litigated controversies. In mere matters of procedure, which are but the means to the end, specific rules of comparative uniformity may be formulated, and many precedents may be thereby established, though, even in this branch of the law, much must necessarily be left to sound judicial discretion. But in the great field of jurisprudence, relating to rights of persons and rights of property, arbitrary and unbending precedents have ever been found too narrow for the multitude of vexatious and complicated controversies arising from the varied transactions of an enlightened and progressive people. Precedents are valuable aids to those who can utilize them with intelligent discrimination; but to those who are dependent upon such assistants, precedents are liable to become uncertain and misleading guides."

We hesitate to quote more from this case, but, since it has been relied upon by appellants, we suggest that the whole case be read. We particularly refer to the language of the dissenting opinion of Justice Elliott. We realize that it is a minority opinion but it sets forth in able manner the rules which should guide the court in interpreting an insurance policy. Although the wording of the policy there in question led two judges to award the proceeds to the estate of the wife, we are convinced that the same rules when applied to the Hill policy will leave no doubt that the benefits should go to the surviving children. The whole of this opinion of Justice Elliott could be adopted in appellees' brief.

The case of *Kottman v. Minnesota Odd Fellows Mut. Ben Soc.*, 66 Minn. 88, 68 N. W. 732 (1896), cited on page 24 of appellants' brief was decided on facts almost identical with the *Chartrand* case and our observations are applicable to both. Again the wording of the policy called for the relating of the words "if living" to a particular date which must be either the death of the insured or a date sixty days after notice and satisfactory proof of death of the insured. The court found as a matter of logic and reason that the proper date to which this event should be related was the date of death of the insured.

In discussing the matter of the law favoring vesting in preference to contingent assets or interests it will be observed that the court in that case was referring to a contingency and uncertainty which would exist if the date selected were the subsequent date sixty days after filing of proof. Under the policy there in discussion determina-

tion of the beneficiary had to be made at a specific time and if the later date were selected there would be an intervening period of at least sixty days in which the uncertainty would continue. The law favored removing this uncertainty by selecting the date of death of the insured. We submit that in the policy under consideration in the present *Hill* case no such uncertainty existed. There was no uncertainty existing because upon the death of the insured the wife (the direct beneficiary) *and* the children (the contingent beneficiaries) were immediately determinable as beneficiaries. In other words, the ones to take the proceeds were immediately named and determined by the policy and no possibility existed that other than these might be entitled to an interest. The only question to be determined by the passage of time was whether the wife would survive long enough to collect all of the benefits. This situation is very similar to that of a grant to a life tenant and remainderman. When both are fixed and determined by the grant both the life tenant and the remainderman take a "vested" interest. The mere uncertainty as to the duration of the interest of the life tenant or the beginning of the interest of the remainderman does not prevent the interest of both "beneficiaries" becoming vested.

The next case referred to in appellants' brief, on page 26, is that of *Northwestern Mutual Life Insurance Company v. Fink,* cited *supra.* A full discussion of this case, which we consider of great importance, will be found near the end of this brief.

Answer to Point II. of Appellants' Brief.

The appellants on page 29 of their brief attack the reasoning of the trial court in arriving at the intent of the insured from the surrounding circumstances as well as the policy itself. These surrounding circumstances are directly in evidence and quoted and referred to by the appellants in their opening brief in the statement of the case on page 2. These surrounding circumstances as set forth in such brief and in the record [R. 36B, 39, 55 *et seq.*] are as follows:

1. When the policy was first taken out on December 2nd, 1942, the proceeds were payable to Mr. Hill's (the insured) three children as direct beneficiaries.

2. When the insured revoked such designation on January 26, 1944, and named his wife the direct beneficiary he did on the same date by separate instrument again include his three children in the policy by naming them contingent beneficiaries in accordance with the rights given them in the policy.

3. The contingent beneficiaries now claiming under the policy are the *children of the insured.*

From these facts shown in the record and the wording of the policy itself the court is called upon to determine the actual intent of the insured when a contest arises between his own children as claimants and the estate of his deceased wife through which the proceeds of his policy might go to either creditors of the wife or legatees or heirs of the wife not known to the insured. These facts as the circumstances surrounding the policy have a bearing on the court's determination. As quoted by appellants in their reference to the *Chartrand* case on page 23 of their brief: "A policy of life insurance is in the nature of a

testament, and, although not a testament, in construing it the courts will so far as possible treat it as a will."

In the interpretation of a will and similarly in the policy of life insurance the court should give due consideration to the natural propensity of a testator or of an insured to provide for his own children, his own heirs and the natural recipients of his bounty and where any doubt exists resolve such doubt in favor of such a natural intent. See *Chartrand v. Brace, supra.*

We, therefore, submit that the Judge of the District Court not only was entitled to consider these facts in determining the actual intent of the insured but he was legally bound to do so and did in fact properly consider them in determining the actual intent of the insured.

Analysis of the Fink Case.

As stated above we consider the *Fink* case (*Northwestern Mutual Life Insurance Company v. Fink,* 118 F. (2d) 761 (C. C. A. 6, 1941) referred to on page 26 of appellants' brief to be highly important. We differ with appellants' interpretation of that case and direct the court's particular attention to it.

Examining the policy in that case which was under consideration we find that it is also a Northwestern Mutual Life Insurance Company policy, and that it has almost the same wording as the policy in our *Hill* case. Paragraph 11 of the General Provisions as quoted in the decision is, with an unimportant variation, identical with sentences (A), (B) and (C) of the Hill policy as these sentences are set out on page 14 of appellants' brief. Paragraph 4 of the Special Provisions in the *Fink* case is almost identical in language with paragraph 5 of the Special Provisions in the *Hill* case [R. 26].

The facts in the Fink case are almost identical with the facts in the *Hill* case. In the *Fink* case the court states the facts as follows "Edwin A. Wolf married twice. He had two children, Virginia C. Wolf and Edwin Wolf, Jr., by his first wife. His first wife died and he married Charlotte S. Wolf. She had two children, Janet and Maurice Harrison, by a previous marriage. The policy was issued October 17th, 1938, and, it, with the application, constitutes the entire contract." Mr. Wolf, the insured, died and his wife survived. Following that and before proceeds of the policy were paid the wife died. The court was called upon to determine whether the proceeds of the policy should be paid to the estate of the deceased wife (direct beneficiary) or to the children of the insured (contingent beneficiaries). These facts are almost identical with the facts in the *Hill* case.

In the designation of direct and contingent beneficiaries in the *Fink* case the insured used the following language: "I, Edwin A. Wolf, the insured . . . hereby designate Charlotte Wolf and Florence W. Gage, wife and sister, as direct beneficiaries under said policy, share and share alike. In the event of the death of Charlotte Wolf such share as she would have been entitled to receive shall be payable to Virginia C. Wolf and Edwin Wolf, Jr., share and share alike, or to the survivor of them." There is some variation here from the *Hill* case but we consider it of slight importance. In accordance with his rights under paragraph 11 of the General Provisions the insured named two direct beneficiaries, his wife and sister, while in the *Hill* case only the wife was named as direct beneficiary. In both cases the children of the insured were made contingent beneficiaries of the wife's interest as direct beneficiary. In both cases the policy provided that if there

were more than one direct beneficiary the interest of any deceased beneficiary including any unpaid benefits due or to become due would pass to the surviving *direct* beneficiary. In the *Fink* case this would have meant that the wife's interest upon her decease would pass to the insured's sister. To pass this interest to the insured's children an addition to the designation was necessary and the insured provided that "in the event of the death of Charlotte Wolf such share as she would have been entitled to receive shall be payable to" insured's children. The effect of this, therefore, was to make the wife the direct beneficiary as to one half of the benefits and the insured's children contingent beneficiaries as to that half.

Appellants seek to point out some distinction of this wording designating direct and contingent beneficiaries in the *Fink* case and the wording setting up direct and contingent beneficiaries in the *Hill* case. This distinction we cannot see. In the *Hill* case there was no need for the insured to repeat the provisions setting forth the rights of the direct and contingent beneficiaries as these were all set out in detail in paragraph 11 of the General Provisions. By designating his wife direct beneficiary Mr. Hill in effect used the following language in such designation: (Sentence (C) of paragraph 11) Upon the death of my wife my children shall succeed to the interest of my wife, including any unpaid benefits due or to become due.

In the *Fink* case the insured accomplished the same purpose in effect as follows: In the event of the death of my wife such share as she would have been entitled to receive shall be payable to my children.

The court in the *Fink* case interpreted the language of the designation to simply designate the wife the direct beneficiary and the children the contingent beneficiaries

stating as follows (page 763): "Charlotte Wolf was, of course, a direct beneficiary," and again, "The insured was fully authorized under paragraph 2 of Clause 11 above quoted to designate the Wolf children as contingent beneficiaries and to fix their interest. He did this in simple language easily understood."

In arriving at the conclusion that the children of the insured and not the estate of the deceased wife should take the proceeds the court made this helpful statement of the law:

> "We must keep in mind at least two general rules applicable to life insurance policies as well as to all other contracts. First, the policy must be read as a whole; and second, effect must be given to the plain, ordinary and popular meaning of the language used."

In answer to the argument about the proceeds becoming "vested" upon the death of the insured in the surviving wife so that her estate would be entitled to the proceeds as against the children of the insured, which is the exact contention now being advanced by appellants in the *Hill* case, the court made the following significant statement: "To adopt appellees' (estate of the deceased wife) insistence that Charlotte Wolf became vested with the right, title and ownership of one-half of the proceeds of the policy upon the death of the insured would be to rewrite the designation of beneficiaries. We would in effect, after the name, Charlotte Wolf, in the last sentence, insert the words 'before the death of the insured,' but the insured made no such limitation. The change would constitute a material alteration which we are not authorized to make."

In passing upon the contention made in the *Fink* case and now advanced by the appellant in the *Hill* case, that

the trial court had no right to consider "surrounding circumstances" the court made this significant statement: "We are not called upon to search for the insured's intention. It is clearly expressed over his own signature. If it were necessary to look for the reason for his action it could probably be found in the natural instinct to protect, first, his widow during her lifetime, and second, his own rather than his step-children . . ."

In its decision the Circuit Court of Appeals reversed the decision of the District Court which had awarded the proceeds of the policy to the estate of the deceased wife and ordered the proceeds paid to the children of the insured (the contingent beneficiaries).

The appellants in the *Hill* case at the bottom of page 28 of their brief state that another reason for the decision in the *Fink* case was that the wife had died prior to filing proof of the insured's death. We point out that this is not a reason for the court's decision, nor is it a valid legal distinction although the facts in the *Fink* and *Hill* cases differ at this point. The court in the *Fink* case after commenting that the wife had died before execution and receipt of proof of his death proceeded to state, "But, this to one side, her right to receive any unpaid share of the proceeds of the policy terminated with her death." Appellants have advanced no argument, and in our opinion they could advance none, to show that the wife's rights were any different after receipt of proof of death by the company than they were before, except the routine matter of collecting the proceeds. The whole argument of appellants in their brief would fall if they adopted this view because their contention is that the rights of the wife vested upon the death of the insured. We will not discuss this point further since it is not an issue in this appeal.

Conclusion.

We submit the issue to this court. Not only does all sound reasoning based upon plain, ordinary and popular meaning of the language used in the Hill policy, indicate that Mr. Hill intended his own children to take any proceeds of the policy not paid to his wife during her lifetime but also the authority of the Sixth Circuit Court of Appeals expressed on April 8th, 1941, in the *Fink* case, and not reversed or excepted to by any court since that time on a set of facts and issues almost identical with those now before this court, confirmed these conclusions and established a precedent which should have the due respect of this court.

It is respectfully submitted that the judgment of the District Court should be sustained and the appeal dismissed.

Respectfully submitted,

Richard H. Forster and
Chauncey E. Snow,
By Chauncey E. Snow,

Attorneys for Appellees, Peter B. Hill, Joanne Hill, also known as Joan A. Hill and Virginia Hill Harder.

Dated: May 18th, 1946.

No. 11235

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

VICTOR H. ROSSETTI and FRANK P. DOHERTY, co-executors of the estate of Genevieve Borlini Hill,

Appellants,

vs.

PETER B. HILL, JOANNE HILL, also known as Joan A. Hill, PATRICIA HILL HARDER and THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,

Appellees.

APPELLANTS' REPLY BRIEF.

LAWLER, FELIX & HALL,
JOHN M. HALL,
800 Standard Oil Building, Los Angeles 15,
Attorneys for Appellants, Victor H. Rossetti and Frank P. Doherty, co-executors of the estate of Genevieve Borlini Hill.

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APPELLANTS' REPLY BRIEF.

Certain matters referred to in Appellees' Brief[1] are dealt with under the following headings.

I.

The Intent of the Insured.

The District Court found that it was the intention of the insured

"as indicated by the provisions of the said policy and the *surrounding circumstances* under which the policy

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[1]Herein references to "Brief" are to pages of Appellees' Brief, and to "R" are to pages of the Transcript of Record. Italics throughout this brief have been supplied.

was issued and the *surrounding circumstances* at the time of the said change of Direct Beneficiary and the designation of the said three children as Contingent Beneficiaries to financially provide for and protect his widow during her lifetime, and next his own children, rather than the creditors, heirs or legatees of the estate of his widow if she should survive the insured and then die before receiving the benefits due or to become due under the said policy." [R. 27.]

What were these "surrounding circumstances"?

The record does not show what they were.[2]

Appellees argue (Brief 26) that they were:

1. The fact that the policy, before the beneficiary was changed, made the children the Direct Beneficiaries.

2. The fact that when the wife was made Direct Beneficiary, the children were made Contingent Beneficiaries.

3. The fact that the Contingent Beneficiaries are the insured's children.

But a reading of the finding quoted above discloses that the "surrounding circumstances" referred to are *something in addition to the "provisions of the said policy" and in addition to the "change of Direct Beneficiary."*

The truth is that there has been no disclosure of any surrounding circumstances in addition to the provisions of the policy and the change of Direct Beneficiary.

Accordingly, we must ascertain the insured's intent *solely* from the policy and the change of Direct Bene-

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[2]A *complete* transcript of the trial proceedings appears in the printed Transcript of Record at page 37 *et seq.* The factual statement referred to at the beginning of the trial [R. 38] is printed in the Transcript of Record at page 36b.

ficiary thereunder. All else is conjecture. Yet the District Court permitted such conjecture to influence its interpretation of the policy. (See our Opening Brief, p. 29 *et seq.*)

Appellees also urge that the policy must be so interpreted as to favor the "natural inclination of the insured to provide for his own children before strangers." (Brief 8.) The difficulty with this contention is that the insured *expressly stated* an inclination to prefer his wife to his children:

> By making his wife Direct Beneficiary *in place of his children.* [R. 39, 55.]
>
> By giving his wife the right *just as soon as he died* (his wife surviving) to select an optional method of payment *and designate any Contingent Beneficiary she wished in place of the children.* [R. 45.][3]

This did not show paramount solicitude for insured's children. On the contrary it manifested a clear intent that the proceeds of the policy should be subject to the wife's *sole control and disposal the minute the insured died* even though this meant that the children would receive nothing.

Of course the wife did not exercise this right before her death following the death of the insured. But here we are attempting to ascertain the insured's intent, and the fact that the wife was given this right by the *express terms of the policy* certainly shows an intent on the part of the insured to vest the proceeds of the policy in his wife *when he died,* even though this resulted in the exclusion of the insured's children.

---

[3]The insured did this by *failing to elect* an optional method of payment under paragraph 1 of the Special Provisions, thus granting the Direct Beneficiary such right under paragraph 1a. [R. 45.]

The foregoing reinforces our argument (see our Opening Brief, p. 14 *et seq.*) that sentence (C) of paragraph 11 of the policy's General Provisions, must be interpreted as referring to a death of the Direct Beneficiary *before the death of the insured.*

II.

The Interpretation Which Would Be Adopted in an Instrument of Testamentary Character.

Appellees urge (Brief 8) that the policy should "be given the broad interpretation *followed in instruments of testamentary character* . . ." Suppose that the clause here in issue, *i. e.,* a part of paragraph 11 of the General Provisions [R. 43, 44], had been found in Hill's will. Such testamentary clause would have read something like this:

> "I give and bequeath $10,000 to my wife, but upon her death, my children, if any *'shall succeed to the interest of'* my wife."

How would this be interpreted if the wife survived the testator but died before distribution? Under the authorities the answer is clear. The death referred to would be interpreted to mean a death of the wife occurring *before the death of the insured.*

As said by Mr. Justice Gray in *Britton v. Thornton,* 112 U. S. 526, 532 (1884):

> "When indeed a devise is made to one person in fee, and 'in case of his death' to another in fee, the absurdity of speaking of the one event which is sure

to occur to all living as uncertain and contingent has led the courts to interpret the devise over as referring *only to death in the testator's lifetime.*"

As said in *McClellan v. MacKenzie,* 126 Fed. 701, 705 (C. C. A. 6, 1903):

> "The law favors the vesting of estates at the earliest possible time. *When a devise or bequest over to a third person is made dependent upon the death of the first taker as a contingency, the death referred to is generally held to be a death in the lifetime of the testator.*"

In *Blain v. Dean,* 160 Iowa 708, 142 N. W. 418 (1913), a will provided, "If any of my children shall have died leaving no issue I direct that his share shall be divided among those leaving issue and among my other children then living." A year and five months after the testator's death and pending administration of his estate one of his daughters died. Holding that she acquired at the testator's death a "vested interest" in his estate which must pass to her heirs, rather than to the other children of the testator, the Court said (142 N. W. at 421):

> "It is impossible to reconcile all the decisions along this line, but it is not too much to say that *the very great weight of authority* is to the effect that a devise to one person with devise over to another in case the first-named beneficiary shall die without issue is to be interpreted *as having reference to the death of such beneficiary before the will takes effect by the decease of the testator,* and that, if the beneficiary be

living at the time of the testator's death, the devise takes effect, although the time for its enjoyment is postponed to some future period or date of distribution."

Accord:

DeHaan v. DeHaan, 309 Ill. 323, 141 N. E. 184 (1923);

Rue v. Lisle, 200 Ky. 520, 255 S. W. 133 (1923);

Washbon v. Cope, 144 N. Y. 287, 39 N. E. 388 (1895);

In re Lovass' Estate, 92 Wis. 616, 67 N. W. 605 (1896).

III.

Paragraph 5 of the Special Provisions.

A reference to paragraph 5 of the policy's Special Provisions [R. 46] does not benefit appellees. As pointed out in our Opening Brief (p. 19) these "Special Provisions" embody a scheme whereby the policy may be continued in effect and operation after the death of the insured, instead of terminating upon payment of the proceeds in one sum upon the insured's death. *In this case the Special Provisions never became operative.*

But a comparison of paragraph 5 of the Special Provisions with paragraph 11 of the General Provisions further supports our interpretation of paragraph 11, *i. e.,* that paragraph 11 relates solely to contingencies happening *before the death of the insured.* (See our Opening Brief, p. 13 *et seq.*)

(1)

(Paragraph 11 of General Provisions): "Upon the death of the last surviving Direct Beneficiary the Contingent Beneficiary or Beneficiaries, if any, shall succeed to the interest of such Direct Beneficiary . . ." [R. 43, 44.]

(2)

(Paragraph 5 of Special Provisions): "Upon the death of the last surviving Direct Beneficiary the *then surviving* Contingent Beneficiary or Beneficiaries shall succeed to the remaining benefits otherwise payable to such Direct Beneficiary . . ." [R. 46.]

(1) above was intended to speak of what might occur *prior to the death of the insured.* A comparison with (2) above reinforces this conclusion. Note the italicized words in (2) which are not found in (1). Why are the words *"then surviving"* omitted in (1)? If (1) is intended to apply to events occurring *after* the death of the insured, then surely such italicized words are necessary. Suppose, for example, that a Direct Beneficiary and two Contingent Beneficiaries survive the insured, and that one of the Contingent Beneficiaries dies 10 days later and the Direct Beneficiary dies 20 days later before the proceeds of the policy have been paid, and suppose that (2) will not govern the rights of the parties, there having been no election to employ the Special Provisions. If, as appellees contend, (1) is to govern events occurring *after* the death of the insured, the *absence* in (1) of the words *"then surviving"* immediately gives rise to controversy as to whether all Contingent Beneficiaries who survived the insured shall take, or whether only the Contingent Beneficiary who survived the insured *and survived the Direct Beneficiary* shall take.

The truth of the matter is that the General Provisions, including paragraph 11, were intended to apply to matters which might happen *at or prior to the death of the insured;* the Special Provisions were intended to govern contingencies occurring *after the death of the insured* in the event (which did not occur here) that an election to make the Special Provisions applicable was exercised. Clearly this was the broad over-all scheme of the policy. An interpretation which would make paragraph 11 of the General Provisions applicable to contingencies occurring *after the death of the insured,* makes the insurance company, by paying promptly or delaying payment, the arbiter as to who shall take the proceeds of the policy. This could not have been the intent of the parties.

IV.

The Contention That Our Interpretation Would Make Performance of the Policy Contract Impossible.

Appellees urge (Brief 10) that the interpretation of the policy we contend for would make performance of the policy contract impossible where the Direct Beneficiary dies after the death of the insured but before the receipt of proof of death. Our argument was that the insurance company promised to pay the proceeds of the policy *"immediately"* upon due proof of death to the Direct Beneficiary; that this definite obligation to pay immediately required an interpretation of the policy by which a beneficiary of this payment would likewise then be capable of definite ascertainment—not a beneficiary whose identity depended upon indefinite events which might or might not happen over an indefinite period. (See our Opening Brief, p. 6 *et seq.*) This argument does not lead to an absurdity as suggested by appellees. If, as we contend, the wife acquired a vested right to the proceeds

of the policy as soon as she survived the insured, her death following that of the insured but before proof of the insured's death, would not result in the absence of a beneficiary to enforce the insurance company's promise to pay "immediately." The death on January 1 of the payee of a promissory note maturing on January 2 does not result in the lack of a promisee to enforce the obligation of the maker of the note.

V.

The Contention That the Contingent Beneficiaries Had a Vested Interest.

Appellees concede (Brief 12) that our exposition of the rule of vesting (see our Brief, p. 9 *et seq.*) correctly states the law. But appellees contend (Brief 12) that "a contingent beneficiary is also a beneficiary under this rule"; that "upon the death of the insured the rights of both the wife . . . and the children . . . became vested or fixed"; that "these rights were that the wife should take the payments made to her during her life and that upon her decease the children should succeed to the balance of the benefits due or to become due." We agree that the rights of both the wife and the children had to be finally ascertained "upon the death of the insured." At that date the wife, being living, acquired a right to the proceeds of the policy. *It is conceded that if the proceeds of the policy had been paid to her before her death, such proceeds could have been retained by her estate,* even though the children received nothing. Under a correct interpretation of the policy this right, vesting in the surviving wife at the death of the insured, was not subject to any condition subsequent admitting the children to participation.

VI.

The Contention That Our Interpretation Would Result in a Poorly Drafted Policy.

Commenting upon our interpretation of paragraph 11 of the policy's General Provisions (see our Opening Brief, p. 13) appellees argue (Brief 14) that such interpretation would result in a poorly drafted policy, since such interpretation makes paragraph 11 applicable solely to contingencies which may happen *before* the death of the insured and "would leave the whole matter of contingencies *after* the death of the insured without any coverage by the policy." But as pointed out in our Opening Brief (p. 18) all of the paragraphs of the General Provisions of the policy deal with situations and contingencies which must arise, if at all, at or *before* the death of the insured. Paragraph 11 of the General Provisions is no exception. It was not necessary for the draftsman of the policy to provide under paragraph 11 for what should happen *after* the death of the insured. Usual rules of law would cover such situation. (See our Opening Brief, pp. 16, 17.) If the general law says what shall happen in a given contingency, the draftsman of a contract may not properly be accused of "poor draftsmanship" in failing to specifically provide therein for such contingency.

VII.

The Difference Between the Fink Case and Our Case.

The facts in *Northwestern Mut. Life Ins. Co. v. Fink,* 118 F. (2d) 761 (C. C. A. 6, 1941), cited and relied upon by appellees (Brief 27 *et seq.*), are clearly different from the facts presented in our case.

Granted that the body of the policy in the *Fink* case was much like the body of the policy in our case, the Court in the *Fink* case decided the issue, *not on the language of paragraph 11 of the General Provisions of the policy, but on the language of the designation-of-beneficiary clause.* This is clear from the language of the opinion (118 F. (2d) at 763).

Now compare the language of this designation-of-beneficiary clause in the *Fink* case and the language of the policy in our case upon which appellees rely:

(1) (*Fink* case)	(2) (Our case)
"In the event of the death of Charlotte Wolf [Direct Beneficiary], *such share as she would have been entitled to receive* shall be payable to Virginia C. Wolf and Edwin Wolf [Contingent Beneficiaries] . . ."	"Upon the death of the last surviving Direct Beneficiary the Contingent Beneficiary or Beneficiaries, if any, *shall succeed to the interest* of such Direct Beneficiary, . . ." [R. 43, 44.]

The difference between these two is significant and decisive.

In the *Fink* case (1), above, the Contingent Beneficiaries, in the event of the death of the Direct Beneficiary, get "such shares as she [the Direct Beneficiary] *would have been entitled to receive.*"

In our case (2), above, the Contingent Beneficiaries, in the event of the death of the last Direct Beneficiary, *"succeed to the interest* of such Direct Beneficiary."

Bearing in mind (as pointed out in our Opening Brief, p. 9 *et seq.*) that a beneficiary does not obtain a vested interest until the death of the insured when (as here) a right to change the beneficiary is reserved, it is clear that until the insured dies the Direct Beneficiary is not *"entitled to receive"* anything. Therefore, in the *Fink* case the statement that the share the Direct Beneficiary was *"entitled to receive"* should upon her death be paid to the Contingent Beneficiaries, *must* have referred to a payment to be made *after* the death of the insured. Before the insured's death the Direct Beneficiary was not and could not have been *"entitled"* to anything.

This is not true of the language used in our case. There it is stated that upon the death of the Direct Beneficiary, the Contingent Beneficiaries shall *"succeed to the interest* of such Direct Beneficiary." This is consistent with our contention that the death of the Direct Beneficiary referred to is a death of such Beneficiary occurring before the death of the insured. Before the insured's death the Direct Beneficiary, while not *"entitled to receive"* anything, nevertheless had an expectancy or contingent *"interest."* (Our Opening Brief, p. 9 *et seq.*)

In the *Fink* case it was held that the language of the designation-of-beneficiary clause determined what should occur upon the death of the Direct Beneficiary *after* the death of the insured.

In our case the language of the policy does not govern what should occur upon the death of the Direct Beneficiary *after* the death of the insured. That contingency is governed by the usual rule of law determining the vesting of a beneficiary's interest. (Our Opening Brief, p. 9 *et seq.*) By that law the Direct Beneficiary, upon the death of the insured, acquired a vested interest in the proceeds of the policy. There is nothing in the policy forbidding this result as there was in the *Fink* case. This being true, the usual rule of law should be applied.

It is respectfully submitted that the judgment of the District Court should be reversed.

May 25, 1946.

Respectfully submitted,

Lawler, Felix & Hall,
John M. Hall,

Attorneys for Appellants, Victor H. Rossetti and Frank P. Doherty, co-executors of the estate of Genevieve Borlini Hill.

No. 11235

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

VICTOR H. ROSSETTI and FRANK P. DOHERTY, co-executors of the Estate of Genevieve Borlini Hill,

Appellants,

vs.

PETER B. HILL, JOANNE HILL, also known as Joan A. Hill, PATRICIA HILL HARDER and THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,

Appellees.

PETITION FOR REHEARING.

FILED

JUN - 7 1947

PAUL P. O'BRIEN,

CLER

FORSTER & GEMMILL,

530 West Sixth Street, Los Angeles 14,

CHAUNCEY E. SNOW,

714 Banks-Huntley Building, Los Angeles 14,

HANNA & MORTON,

1126 Pacific Mutual Building, Los Angeles 14,

Attorneys for Appellees Peter B. Hill, Joanne Hill, also know as Joan A. Hill, and Patricia Hill Harder.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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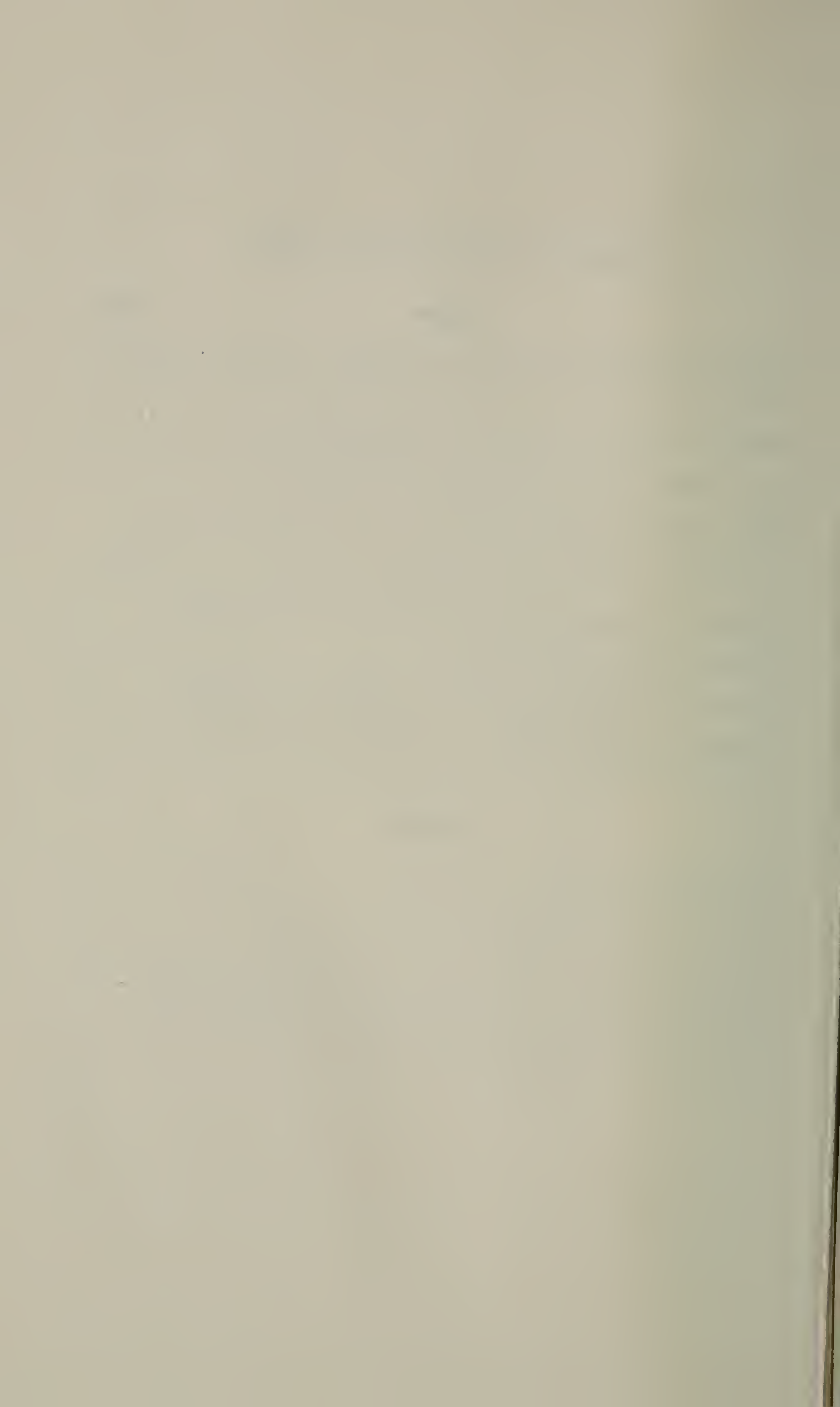

No. 11235

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

VICTOR H. ROSSETTI and FRANK P. DOHERTY, co-executors of the Estate of Genevieve Borlini Hill,

Appellants,

vs.

PETER B. HILL, JOANNE HILL, also known as Joan A. Hill, PATRICIA HILL HARDER and THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,

Appellees.

PETITION FOR REHEARING.

Now come appellees Peter B. Hill, Joanne Hill, also known as Joan A. Hill, and Patricia Hill Harder, and, pursuant to Rule 25 of this Court, respectfully petition this Honorable Court for a rehearing and reconsideration of this cause on the following grounds:

1. A question of local law has been decided herein in a way in conflict with applicable local statutes and decisions.

2. The decision entered herein is in conflict with the decision of another Circuit Court of Appeals on a similar question.

3. The District Court did not have jurisdiction to consider this action.

The question involved in this case, it will be recalled, is whether the proceeds of a life insurance policy should go to the estate of the insured's widow, who was named as direct beneficiary but who died after the insured's death and prior to receiving any of the proceeds of the policy, or to the children of the insured by a former marriage who were named as contingent beneficiaries. The controversy relates chiefly to the proper construction of a provision contained in Section 11 of the General Provisions of the policy reading as follows:

> "Upon the death of the last surviving Direct Beneficiary the Contingent Beneficiary or Beneficiaries, if any, shall succeed to the interest of such Direct Beneficiary, including any unpaid benefits due or to become due."

The decision of this Court was that the quoted provision could apply only if the direct beneficiary died during the lifetime of the insured and that the proceeds of the policy should be paid to the estate of the deceased widow, the direct beneficiary.

At the outset we desire to state that the construction of the form of insurance policy involved in this case is of more widespread interest than merely to the parties to this proceeding. Appellees are advised that the form of language used in Section 11 of the General Provisions of the policy here in question has been regularly employed in life insurance policies issued by The Northwestern Mutual Life Insurance Company over a period of some seventeen years. The construction placed upon that language in this case will, therefore, have a broader effect than if the contract being construed were a unique specimen as between the present parties only.

It is submitted, with all respect, that a rehearing and reconsideration of this cause should be granted for the following reasons:

1. *The decision entered herein is in conflict with the law of the State of California in that it nullifies and gives no effect to the phrase "including any unpaid benefits due or to become due" contained in the insurance policy in question.*

The parties have agreed in their briefs that the insurance policy in question, having been negotiated for and delivered in California, must be interpreted in accordance with California law. (Appellants' Op. Br. pp. 12-13; Appellees' Br. pp. 1-2.)

California law requires that each and every clause and provision in a contract be given force and effect.[1]

---

[1]Section 1641 of the California Civil Code provides:

"The whole of a contract is to be taken together, *so as to give effect to every part,* if reasonably practicable, each clause helping to interpret the other." (Emphasis added.)

Section 1858 of the California Code of Civil Procedure provides:

"In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained thereon, not to insert what has been omitted, *or to omit what has been inserted;* and where there are several provisions or particulars. such a construction is, if possible. to be adopted *as will give effect to all.*" (Emphasis added.)

Among the many California cases applying this rule are:

Cummins v. Bank of America (1941), 17 Cal. (2d) 846, at 849;

Scudder v. Perce (1911), 159 Cal. 429, at 433;

Neale v. Morrow (1907), 150 Cal. 414, at 418;

Schrank v. Sterling Products Co. (1939), 33 Cal. App. (2d) 107, at 110.

As was said in *L. C. Morgan Co. v. Christensen* (1924), 65 Cal. App. 474, at 478:

"If the construction which the defendant contends for should prevail, it would render nugatory the last covenant contained in the written instrument . . . it is the duty of the courts to give some force and effect to each and every clause contained in the contract."

The decision interpreting Section 11 of the General Provisions of the policy [R. pp. 43-44] as defining the rights of the beneficiaries *at the time of, but not after,* the death of the insured, results in the complete nullification, for all purposes under the contract, of the clause *"including any unpaid benefits due or to become due"* contained in sentences (B) and (C) of Section 11 (as designated on page 14 of Appellants' Opening Brief). There is no situation to which the quoted clause can apply under that construction.

The "unpaid benefits" clause cannot apply only to the "incidental" benefits in the form of dividends provided for under Section 9 of the General Provisions [R. pp. 42-43], as suggested by appellants (Op. Br. pp. 17-18) and, with all deference, as stated in the opinion of the Court. Those dividends are payable only to the insured during his life, and can *never* become payable to a beneficiary, direct or contingent, while the insured is alive. A beneficiary can receive a dividend under Section 9 only "with the proceeds of the Policy", *i. e.,* after the death of the insured. Under the construction placed on the policy by the decision herein, a contingent beneficiary can take under sentence (C) of Section 11 only if the direct beneficiary dies during the lifetime of the insured. Yet a direct beneficiary could never become entitled to receive dividends or post mortem dividends during the lifetime of the insured, and hence it would be impossible, under that construction, for the contingent beneficiary to succeed to the interest of a direct beneficiary "including any unpaid benefits due or to become due" in the sense of incidental benefits in the form of dividends. The quoted clause becomes entirely meaningless under that construction. It cannot apply only (as it is said to apply), or

indeed at all, to the "incidental" benefits. And even if it could apply to the "incidental" benefits, there is no reason for restricting its application to those benefits alone. The ordinary and usual meaning of "benefits due or to become due" under an insurance policy is certainly broad enough to include any and all proceeds thereof.

When effect is given to the phrase "including any *unpaid* benefits *due* or *to become due,"* as required by California law, the conclusion is inescapable that sentences (B) and (C) of Section 11 contemplate and refer to periods *both before and after* the death of the insured, and that when, as in this case, the direct beneficiary dies *after* the insured's death but *before* receiving the entire proceeds of the policy and before making an election of one of the options under Section 1a of the Special Provisions, the then unpaid benefits due or to become due are payable to the contingent beneficiaries (appellees herein).

It is a settled rule of law that the interest of a beneficiary, direct or contingent, where the right to change beneficiaries is reserved, is a mere expectancy until the death of the insured. (See Appellants' Op. Br. pp. 9-12.] Hence there can be nothing "due" or certain "to become due" to a direct beneficiary until after the insured's death. The proceeds of the policy become "due" only after death of the insured *and* upon receipt of due proof of death. [R. p. 39.] But after the death of the insured and before proof has been made, it is proper to say that the benefits are "to become due." Since nothing can be "due" or payable to a direct beneficiary until after the insured's death, it is clear that no "unpaid benefits" can be "due" to a direct beneficiary while the insured is alive.

Sentence (C) of Section 11 provides that upon the death of the last surviving direct beneficiary, the contingent beneficiaries "shall succeed to the interest of such Direct Beneficiary, including any unpaid benefits due or to become due." It may be conceded that a direct beneficiary who died before the death of the insured would have an expectancy "interest" to which the contingent beneficiaries might succeed under that provision. But no such expectancy "interest" of a direct beneficiary predeceasing the insured could possibly include "any unpaid benefits due or to become due" because, as noted above, no benefits of any kind could possibly become due or payable to a direct beneficiary prior to the death of the insured. To construe sentence (C) as stating that which takes place *only* upon the death of the direct beneficiary *prior* to the death of the insured, is with all respect, completely to nullify for all purposes the phrase "including any unpaid benefits due or to become due." In order to give effect to that phrase and to make it possible for a contingent beneficiary to succeed to the interest of a direct beneficiary, which interest includes "unpaid benefits due or to become due," the sentence must be construed as stating that which takes place upon the death of the direct beneficiary either *before* the death of the insured, or *after* the insured's death at a time when benefits due or to become due are as yet unpaid.

It is, of course, true that the rights of the contingent beneficiaries could have been cut off if the direct beneficiary in this case had actually received the full proceeds of the policy prior to her death or if she had elected one of the optional forms of settlement under Section 1a of the Special Provisions. If she had received full payment of the proceeds prior to her death, there would have

been no "unpaid benefits due or to become due" to which the contingent beneficiaries could have succeeded. And if she had elected one of the optional forms of settlement, Section 1a of the Special Provisions provides specifically that upon such election by the direct beneficiary "the interest of any Contingent Beneficiary designated by the Insured shall terminate." But that provision entitling the direct beneficiary, by appropriate action, to *terminate the interest of the contingent beneficiaries* designated by the insured, serves but to reinforce the construction contended for herein. If the rights of the direct beneficiary were intended to vest in her irrevocably at the first point of time occurring after the insured's death, she surviving him, then there would be no remaining interest of any contingent beneficiary which could be terminated under the above provision. There then would have been no need to insert the termination provision as a means of avoiding "conflict between the contingent beneficiary selected by the insured and a new contingent beneficiary selected by the wife" under Section 1a, as argued by appellants (Appellants' Op. Br. pp. 21-22). Under the construction placed upon the policy by the decision herein, the direct beneficiary's mere survival of the insured would have forever determined that the contingent beneficiaries had no interest whatsoever which would require termination or which could possibly conflict with the interests of a new contingent beneficiary selected by the wife. The construction adopted by the decision gives no effect whatever to the provisions of Section 1a of the Special Provisions with reference to the termination of the interest of the contingent beneficiaries upon election of one of the options by the direct beneficiary. That provision with respect to termination can be made meaningful only by

adopting a construction of the policy under which some interest remains in the contingent beneficiaries after the direct beneficiary survives the insured. The interest that so remains in the contingent beneficiaries is the right under sentence (C) of Section 11 to succeed to the interest of a direct beneficiary who dies after the death of the insured while there are "unpaid benefits due or to become due."

The construction of the policy herein contended for is supported by reason and by sound public policy. Insurance proceeds are normally intended to provide financial support for dependents, particularly during the period immediately following the death of the insured. There are, therefore, strong reasons in public policy for favoring a construction of an insurance policy which will permit the insurance company to make payment of the proceeds to a living beneficiary rather than to the estate of a deceased beneficiary. Funds paid into an estate may often be tied up for considerable periods of time, whereas funds paid to a living beneficiary may well provide essential financial assistance in an otherwise difficult period. The insertion in the policy by the issuing company of sentences (B) and (C) of Section 11 is a recognition of this general public policy. It was intended that this language would eliminate the delay and expense of probating the proceeds in the estate of the direct beneficiary in the event of the direct beneficiary's death after the death of the insured but prior to receipt of the proceeds. However, in order to protect the direct beneficiary in case of a change of circumstances or unusual delay in making payment, Section 1a of the Special Provisions was inserted. Under that section the direct beneficiary was given the right to cut off the interests of the contingent bene-

ficiaries if she so desired. The inclusion of those provisions nullifies the appellants' argument that the ascertainment of beneficiaries would be indefinite under our construction (Appellants' Op. Br. pp. 7-8), and makes inapplicable all the cases which have construed other types of contracts not containing provisions of this nature.

Furthermore, there is no inconsistency in the action of the insured in this case in making the proceeds of the policy subject to the absolute control of his wife if she should survive him and in also providing that those proceeds should go to his children in the event that his wife died before either receiving payment of the proceeds in full or electing an optional method of settlement. It is not at all unusual for an insured to provide a considerable degree of flexibility and latitude in the handling of the proceeds of his insurance by his beneficiaries.

2. *The decision entered herein is in conflict with the decision in Northwestern Mutual Life Insurance Co. v. Fink (C. C. A. 6, 1941), 118 F. (2d) 761, reaching a contrary conclusion as to the construction of a similar policy issued by the same insurance company, thus producing a divergence in the judicial construction of a widely used form of insurance policy.*

As noted above, the language of Section 11 of the policy here in question has been used in a large number of life insurance policies issued over a considerable period of time. It is therefore of more than ordinary importance to note that a policy issued by the same insurance company and containing in Section 11 substantially identical language, including the "unpaid benefits" clause, has been construed by the Circuit Court of Appeals for the Sixth Circuit in *Northwestern Mutual Life Insurance*

Co. v. Fink (1941), 118 F. (2d) 761, to require payment of the entire proceeds to the living contingent beneficiaries in a case where the direct beneficiary died after the death of the insured but before actually receiving any of the proceeds. In the *Fink* case, the direct beneficiary died before making proof of the insured's death rather than after making such proof as in this case; but that is not a material distinguishing factor, for the making of proof of death would affect only the time when the payments would become due. The Court in the *Fink* case, while it mentioned the failure to make proof of death, relied upon a construction of the policy and the terms of a separate designation of beneficiaries. That designation, which was different from the designation in this case, provided that: "In the event of the death of Charlotte Wolf [the direct beneficiary], *such share as she would have been entitled to receive* shall be payable to" the children of the insured. The court refused to adopt the contention of the administratrix of the direct beneficiary's estate that Charlotte Wolf, upon surviving the insured, became irrevocably vested with the right to the proceeds, saying that to do so would be in effect to rewrite the policy by inserting the words "before the death of insured" after the name of Charlotte Wolf in the sentence quoted above from the designation. It is submitted, with all deference, that the effect of the decision herein is to do just what the court in the *Fink* case declined to do.

In attempting to distinguish the *Fink* case, appellants have relied upon the language of the designation stating that if Charlotte Wolf died, "such share as she would have been entitled to receive" should be payable to the

children. Thus they assert that Charlotte could not have been "entitled to receive" anything until the death of the insured and conclude that the language of the designation therefore obviously spoke of her death after she was "entitled" to something, *i. e.*, at a time after the death of the insured. (Appellants' Op. Br. pp. 27-28.) It is respectfully submitted, however, that that case is indistinguishable in principle from this one. Under the provision in the policy here in issue stating that the contingent beneficiaries shall, upon the death of the direct beneficiary, succeed to her interest, "including any unpaid benefits due or to become due," it is clear that there could be no "unpaid" benefits "due or to become due" to the direct beneficiary until after the death of the insured. It thus follows that the provision states what is to happen not only when the direct beneficiary predeceases the insured, but also in the event of the death of the direct beneficiary when there are or may be "unpaid benefits due or to become due," *i. e.*, at a time after the insured's death.

If the decision entered herein is permitted to stand, it will be in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit upon the construction of a similarly worded insurance policy issued by the same company, a result which would be particularly undesirable in the case of a form of insurance policy which is in widespread use throughout the country.

3. *Section Two, Article III of the United States Constitution, and the Judicial Code, Section 24, 28 U. S. C. A., Section 41, do not give jurisdiction to the Federal District Court in an interpleader action where all claimants to the fund are residents of the same state.*

Appellants cite *Security Trust and Savings Bank v. Walsh* (C. C. A. 9, 1937), 91 F. (2d) 481, as authority that the District Court had jurisdiction in this action. It is respectfully submitted that the decision in *Treinies v. Sunshine Mining Co.* (1940), 308 U. S. 66, 60 S. Ct. 44, 84 L. Ed. 85, casts doubt upon this authority. In the *Treinies* case, the Supreme Court held that the Federal District Court had jurisdiction under 28 U. S. C. A., Section 41, Subsection 26, where the interpleader and one of the claimants to the fund were citizens of the same state, and where the claimants to the fund were citizens of different states. In so holding, the Court reasoned that since the controversy between the claimants "could have been settled by litigation between them in the federal courts," the limits of judicial power imposed by the Constitution were satisfied. The complainant (interpleader) was held to be a proper party to the determination of the controversy between the adverse claimants, citizens of different states, but the Court also pointed out that the deposit and discharge of the complainant effectively demonstrates its disinterestedness as between the claimants and as to the property in dispute. In other words, the real controversy in such an action as this is between the claimants, and not between the complainants and the claimants. How, then, in the instant case, could the District Court have had jurisdiction to determine the controversy between the adverse *claimants,* citizens of the same state, that is, California?

The controlling nature of the decision in the *Security Trust and Savings Bank* case is questioned by footnote 17 in the *Treinies* case, wherein it is said:

> "We do not determine whether the ruling here is inconsistent with the conclusion in those cases where

jurisdiction was rested on diversity of citizenship between the applicant and cocitizens who are claimants. (Mallers v. Equitable Life Assurance Soc., 7 Cir., 87 F. (2d) 233, certiorari denied, 301 U. S. 685, 57 S. Ct. 786, 81 L. Ed. 1343 (New York corporation impleads Illinois claimants); Security Trust & Savings Bank of San Diego v. Walsh, 9 Cir., 91 F. (2d) 481 (English corporation impleads California claimants); Penn. Mut. Life Ins. Co. v. Meguire, D. C., 13 F. Sup. 967, 971 (Pennsylvania corporation impleads Kentucky claimants); Turman Oil Co. v. Lathrop, D. C., 8 F. Supp. 870, 872 (Delaware corporation impleads Oklahoma claimants)."

See, also, *Central Life Assurance Society v. McGregor, et al.* (D. C. Washington, 1945), 60 F. Supp. 578.

On the basis of the foregoing, it is respectfully urged that this Petition for Rehearing should be granted, and that the insurance policy in question should be so construed as to require payment of the proceeds to the appellees, the Hill children, under the facts of this case.

Respectfully submitted,

FORSTER & GEMMILL and
CHAUNCEY E. SNOW,
By JOHN G. GEMMILL,
HANNA & MORTON,
By PATRICK JAMES KIRBY,

Attorneys for Appellees Peter B. Hill, Joanne Hill, also know as Joan A. Hill, and Patricia Hill Harder.

Certificate of Counsel.

The undersigned counsel for appellees do hereby certify that in their judgment the foregoing Petition for Rehearing is well founded and that it is not interposed for purposes of delay.

FORSTER & GEMMILL and
CHAUNCEY E. SNOW,
By JOHN G. GEMMILL,

HANNA & MORTON,
By PATRICK JAMES KIRBY,

Attorneys for Appellees Peter B. Hill, Joanne Hill, also known as Joan A. Hill, and Patricia Hill Harder.

No. 11236

United States
Circuit Court of Appeals
For the Ninth Circuit.

BOWER-GIEBEL WHOLESALE CO., a co-partnership composed of Earl E. Bower and Walter Hamilton Bower,

Appellant,

vs.

SEARS-ROEBUCK & CO., a corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

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No. 11236

United States
Circuit Court of Appeals
For the Ninth Circuit.

BOWER-GIEBEL WHOLESALE CO., a co-partnership composed of Earl E. Bower and Walter Hamilton Bower,

Appellant,

vs.

SEARS-ROEBUCK & CO., a corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

Rotary Colorprint, 661 Howard Street, San Francisco

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

JEROME D. ROLSTON,

6253 Hollywood Blvd.,

Los Angeles 28, Calif.

For Appellee:

JOHN L. WHEELER,

1239 Pacific Mutual Bldg.,

Los Angeles 14, Calif. [1*]

*Page numbering appearing at foot of page of original certified Transcript.

In the Superior Court of the State of California in and for the County of Los Angeles

No. 492465

BOWER-GIEBEL WHOLESALE CO., a co-partnership, composed of EARL E. BOWER & WALTER HAMILTON BOWER,

Plaintiff,

vs.

SEARS-ROEBUCK & CO., a Corporation, DOE ONE AND DOE TWO,

Defendants,

COMPLAINT

MONEY

I.

That the true names of defendants Doe One and Doe Two, are unknown to plaintiff who prays leave to amend this complaint by inserting said true names herein when same are ascertained.

II.

That at all times herein mentioned the plaintiff was, and now is, a co-partnership composed of Earl E. Bower & Walter Hamilton Bower, who have heretofore filed with the County Clerk of Los Angeles County, State of California, their business certificate showing the ownership of such business, and have published said certificate as required by and in compliance with Section 2466 and 2468 of the Civil Code of the State of California. [2]

III.

That the defendant, Sears-Roebuck & Co., is a corporation duly organized and existing under and by virtue of the laws of the State of New York and that it has filed, and is duly authorized to do business in the State of California and has filed a copy of its certificate in the County of Los Angeles.

IV.

That the transaction herein sued upon were contracted for and payable in the County of Los Angeles, State of California.

V.

That within two years last past, defendants became indebted to plaintiff for goods, wares and merchandise sold and delivered to and services rendered to defendants at their special instance and request, in the agreed and reasonable value of $7,738.99, which said sum defendants promised to pay together with interest thereon at the rate of 7% per annum from January 14th, 1944.

VI.

That demand has been made for payment of said sum, but that no part thereof has been paid and the whole thereof remains due, owing and unpaid.

For a Second Cause of Action, Plaintiff alleges:

I.

Realleges all the allegations of Paragraphs I, II, III, IV and VI of the First Cause of Action as if herein specifically pleaded.

II.

That within four years last past the defendants became indebted to plaintiff for a balance due upon an open book account in the sum of $7,738.99 which amount defendants agreed to pay together with interest thereon at the rate of 7% per annum from January 14, 1944. [3]

For a Third Cause of Action, Plaintiff alleges:

I.

Realleges all the allegations of Paragraphs I, II, III, IV and VI of the First Cause of Action as if herein specifically pleaded.

II.

That within four years last past an account was stated between plaintiff and defendants, whereby the sum of $7,738.99 was found to be due to plaintiff from defendants, which said sum defendants then agreed to pay together with interest thereon at the rate of 7% per annum from January 29th, 1944.

Wherefore, plaintiff prays judgment against the defendants and each and all of them in the sum of $7,738.99 with interest thereon at the rate of 7% per annum from January 29, 1944; for costs of suit incurred herein and for such other and further relief as to the Court may seem just and proper in the premises.

(Signed) JEROME D. ROLSTON

Attorney for Plaintiff [4]

State of California,
County of Los Angeles—ss.

Earl E. Bower, being by me first duly sworn, deposes and says that he is the partner of the plaintiff in the above entitled action; that he has read the foregoing Complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters that he believes it to be true.

(Signed) EARL E. BOWER

Subscribed and sworn to before me this 6th day of April, 1944.

[Seal] JEROME D. ROLSTON

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed April 12, 1944. [5]

[Title of Superior Court and Cause.]

PETITION FOR REMOVAL

Petition for Removal of Cause to the United States District Court for the Southern District of California, Central Division.

To the Superior Court of the State of California in and for the County of Los Angeles:

Your petitioner, Sears-Roebuck and Co., defendant in the above entitled cause, respectfully shows to this Court:

1. The above-entitled suit has been brought in this Court and is now pending therein.

2. Said action is of a civil nature at law and is brought to recover damages for breach of contract.

3. The controversy in said suit is between citizens of different states in that Bower-Giebel Wholesale Co., a co-partnership composed of Earl E. Bower and Walter Hamilton Bower, and each of said partners, was, at the time of the commencement of said suit in this court, and still is, a citizen of the State of California, and your petitioner, Sears-Roebuck and Co., was, at the time of the commencement of this action, and still is, a foreign corporation created and existing under the laws of the State of New York, and was and still is a resident and citizen of the State of New York and a non-resident of the State of California.

4. Said action is one in which the District Courts of the United States are given original jurisdiction. [6]

5. That the time within which your petitioner is required by the laws of this State and the rules of this Court to answer or plead to the Complaint in the above-entitled action has not yet expired.

6. The value of the matter in controversy in said action exceeds $3,000, exclusive of interest and costs, as appears from the allegations of plaintiff's complaint.

7. Petitioner presents herewith a bond with good and sufficient surety that it will enter in the

District Court of the United States for the Southern District of California, Central Division, within thirty days of the date of filing of this petition, a certified copy of the record in this suit and that he will pay all costs that may be awarded by said District Court in case the said Court shall hold that this suit was wrongfully or improperly removed thereto.

8. Prior to the filing of this petition and of said bond for the removal of said cause, written notice of intention to file the same was given by petitioner to the plaintiff as required by law, a true copy of which, with proof of service of the same, is attached hereto.

Wherefore, petitioner prays that this Court proceed no further herein except to make an order of removal as required by law and to accept said surety and bond and to cause the record herein to be removed into said District Court of the United States within and for the Southern District of the State of California, Central Division, according to the statute in such cases made and provided.

Dated: May 5th, 1944.

SEARS-ROEBUCK AND CO.
By JOHN L. WHEELER
Attorney for Petitioner [7]

State of California,
County of Los Angeles—ss.

John L. Wheeler being by me first duly sworn, deposes and says: That he is the attorney for the

Petitioner; that petitioner is unable to make the verification because it is a foreign corporation and is absent from said county; for that reason affiant makes this verification on petitioner's behalf in the above entitled action; that he has read the foregoing Petition for Removal and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

JOHN L. WHEELER

Subscribed and sworn to before me this 5th day of May, 1944.

[Seal] DOROTHY MOSS

Notary Public in and for the County of Los Angeles, State of California

My Commission expires Nov. 25, 1946.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed May 6, 1944. [8]

[Title of Superior Court and Cause.]

BOND ON REMOVAL

Know All Men By These Presents, That Sears-Roebuck & Co., a corporation, as Principal, and the American Employers' Insurance Company, a corporation organized and existing under and by virtue of the laws of the State of Massachusetts, and duly authorized to transact business in the State

of California, as Surety, are held and firmly bound unto Bower-Giebel Wholesale Co., Plaintiff in the above entitled action, their successors or assigns, in the sum of Five Hundred and No/100 Dollars ($500.00), lawful money of the United States of America, for the payment of which well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

The condition of the above obligation is such, That

Whereas, Sears-Roebuck & Co., a corporation, the Defendant in the above entitled action, has applied, or is about to apply by petition to the Superior Court of the State of California, in and for the County of Los Angeles, for the removal of a certain cause therein pending wherein Bower-Giebel Wholesale Co., is the Plaintiff, and Sears-Roebuck & Co. is the Defendant, to the District Court of the United States for the Southern District of California, Central Division, for further proceedings on the ground in said petition set forth, and that all further proceedings in said action be stayed.

Now, Therefore, if the above named Defendant shall within [10] thirty (30) days from and after the date of the filing of said petition, enter in said District Court of the United States for the Southern District of California, Central Division, a duly certified copy of the record in the above entitled action, and shall pay or cause to be paid, all costs that may be awarded therein by the said District

Court of the United States, if such Court shall hold that such suit was wrongfully and improperly removed thereto, then this obligation to be void; otherwise to remain in full force and effect.

Dated and signed this 5th day of May, 1944.

[Seal] AMERICAN EMPLOYERS' INSURANCE COMPANY

(Signed) By P. J. GAUTHIER
Attorney-in-fact

State of California,
County of Los Angeles—ss.

On this 5th day of May, A.D., 1944, before me, Gladys M. Cooney, a Notary Public in and for said County and State, personally appeared P. J. Gauthier known to me to be the person whose name is subscribed to the within Instrument, as the Attorney-in-fact of American Employers' Insurance Company, and acknowledged to me that he subscribed the name of American Employers' Insurance Company thereto as principal and his own name as Attorney-in-fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] GLADYS M. COONEY,
Notary Public in and for said County and State
My commission expires Feb. 10, 1945.

The premium charged for this bond is $10.00 per annum for the term thereof.

Bond approved May 15, 1944.

A. E. PAONESSA
Judge

Approved this 12th day of May, 1944.

H. C. SHEPHERD
Court Commissioner [11]

In the Superior Court of the State of California
In and for the County of Los Angeles

Honorable Alfred E. Poanessa, Judge Presiding.

[Title of Cause.]

MINUTE ORDER
(Entered May 15, 1944)

Petition and Bond of defendant Sears-Roebuck and Company for Removal to United States District Court, Southern District of California, Central Division, comes on for hearing; Jerome D. Rolston appearing as attorney for the plaintiff and John L. Wheeler for the defendant. Said matter is continued to May 15, 1944, Notice waived. [12]

In the Superior Court of the State of California
In and for the County of Los Angeles

Honorable Alfred E. Paonessa, Judge Presiding.

[Title of Cause.]

MINUTE ORDER
(Entered May 18, 1944)

Petition and Bond of defendant Sears-Roebuck & Company for Removal to the United States District Court, Southern District of California, Central Division, comes on for hearing; Jerome D. Rolston appearing at attorney for the plaintiff and John L. Wheeler for defendant moving. Petition is granted and Bond approved. [13]

[Title of Superior Court and Cause.]

ORDER OF REMOVAL TO UNITED STATES DISTRICT COURT

Good cause appearing and there having been presented to the Court a petition and bond in due form for removal of the above entitled action to the District Court of the United States for the Southern District of California, Central Division, and it further appearing that written notice of said petition and bond for removal has been given plaintiff in the above entitled action prior to filing the same.

Now, Therefore, It Is Ordered:

1. That said petition for removal be and the

same hereby is granted, that the above entitled action be and the same hereby is removed to the District Court of the United States for the Southern District of California, Central Division.

2. That said bond presented herewith be and the same hereby is approved.

3. That the Clerk of this Court be and he hereby is ordered and directed to prepare a certified transcript and copy of the record herein to be filed with the said District Court of the United States in the manner and form as provided by law in such case.

4. That all proceedings in this Court in said cause be stayed.

Dated: May 15th, 1944.

A. E. PAONESSA,
Judge of the Superior Court

[Endorsed]: Filed May 15, 1944. [14]

State of California,
County of Los Angeles—ss.

I, J. F. Moroney, County Clerk and Clerk of the Superior Court in and for the County and State aforesaid, do hereby certify the foregoing copies of documents consisting of the Complaint, Notice of hearing and filing petition for removal, Petition for Removal, Bond on Removal, Minute Order of May 11, 1944, continuing hearing, Minute Order of May 15, 1944, granting petition for removal, and written Order for Removal to the District Court of the

United States for the Southern District of California (Central Division), in the action of Bower-Giebel Wholesale Co., a co-partnership, composed of Earl E. Bower & Walter Hamilton Bower vs. Sears-Roebuck & Co., a corporation, et al, to be a full, true and correct copy of all of the original documents on file and/or of record in this office in the above entitled action to and including the date the motion was granted for Removal to the District Court of the United States, and that I have carefully compared the same with the original.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the Superior Court this 2nd day of June, 1944.

J. F. MORONEY
County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles

By S. M. MILEY
Deputy

[Endorsed]: Filed June, 1944.[15]

In the District Court of the United States, Southern District of California, Central Division

No. 3676-Y

BOWER-GIEBEL WHOLESALE CO., a co-partnership, composed of EARL E. BOWER & WALTER HAMILTON BOWER,

Plaintiff,

vs.

SEARS-ROEBUCK AND CO., a Corporation, DOE ONE AND DOE TWO,

Defendants.

ANSWER TO COMPLAINT AND COUNTERCLAIM

Comes Now the defendant, Sears-Roebuck and Co., and answering the complaint herein, admits, denies and alleges as follows:

I.

Alleges that the true and correct name of this answering defendant is Sears-Roebuck and Co.

II.

Answering Paragraphs II, III and IV of said complaint, admits the allegations thereof.

III.

Answering Paragraphs V and VI, denies generally and specifically said paragraphs and each and every allegation therein contained. [16] Further answering said paragraphs, denies that the de-

fendant was or is indebted to the plaintiff as alleged, or otherwise, or at all, or in the amount alleged, or in any other amount.

Answering Plaintiff's Second Cause of Action, this answering Defendant admits, denies and alleges:

I.

Answering Paragraph I of said Second Cause of Action, admits Paragraphs I, II, III and IV of plaintiff's first cause of action realleged in said paragraph; denies generally and specifically Paragraph VI of the first cause of action realleged in Paragraph I and each and every allegation therein contained. Further answering said paragraph, denies that the defendant was or is indebted to the plaintiff as alleged, or otherwise, or at all, or in the amount alleged, or in any other amount.

II.

Answering Paragraph II, denies generally and specifically said paragraph and each and every allegation therein contained; and further answering said paragraph denies that the defendant was or is indebted to the plaintiff as alleged or otherwise, or at all, or in the amount alleged, or in any other amount.

Answering Plaintiff's Third Cause of Action, this answering Defendant admits, denies and alleges:

I.

Answering Paragraph I of said Third Cause of

Action, admits Paragraphs I, II, III and IV of plaintiff's first cause of action realleged in said paragraph; denies generally and specifically Paragraph VI of the first cause of action realleged in Paragraph I and each and every allegation therein contained. Further answering said paragraph, denies that the defendant was or is indebted to the plaintiff as alleged, or otherwise, or at all, or in the amount [17] alleged, or in any other amount.

II.

Answering Paragraph II, denies generally and specifically said paragraph and each and every allegation therein contained. Further answering said paragraph, denies that the defendant was or is indebted to the plaintiff as alleged or otherwise, or at all, or in the amount alleged, or in any other amount.

COUNTERCLAIM

The defendant, for counterclaim herein, alleges:

I.

That the plaintiff, Bower-Giebel Wholesale Co., a co-partnership, composed of Earl E. Bower and Walter Hamilton Bower, is and has been for some time past engaged in the sale of candy and other confections in the County of Los Angeles.

II.

That the defendant, Sears-Roebuck and Co., is and has been for some time past engaged in the sale of general merchandise at retail, including

candy and confections in the County of Los Angeles; that the plaintiff, knowing of the retail business in which the defendant was and is engaged and knowing that the defendant desired to purchase candy to be used in defendant's retail business, on or about October 20th, 1943, sold to the defendant 28,000 pounds of chocolate pecan fudge to be used by the defendant in said retail business to the knowledge of the plaintiff; and the plaintiff then and there warranted the same to be of merchantable quality and in all respects fit and proper for such use.

III.

That the defendant relied upon said warranty and attempted to [18] use said candy for the purpose aforesaid, but that the same, when offered for sale, proved unfit for sale at retail in that it was moldy and otherwise unsuited for sale in defendant's retail business.

IV.

That as soon as said unfitness was ascertained, defendant notified the plaintiff thereof.

V.

That said fudge, as warranted, had a reasonable value to the defendant of 89c per pound for purposes of sale in defendant's retail business; that by reason of the unfitness of said candy for the purpose of sale at retail by defendant, defendant was and is damaged in the sum of $10,358.02.

For a second, separate and further Cause of Counterclaim, Defendant alleges:

I.

That the plaintiff, Bower-Giebel Wholesale Co., a co-partnership, composed of Earl E. Bower and Walter Hamilton Bower, is and has been for some time past engaged in the sale of candy and other confections in the County of Los Angeles.

II.

That the defendant, Sears-Roebuck and Co., is and has been for some time past engaged in the sale of general merchandise at retail, including candy and confections, in the County of Los Angeles; that the plaintiff, knowing of the retail business in which the defendant was and is engaged and knowing that the defendant desired to purchase candy to be used in defendant's retail business, on or about October 20th, 1943, sold 28,000 pounds of chocolate pecan fudge to be used by the defendant in said retail business to the knowledge of the plaintiff; and the plaintiff then and there warranted, in accordance [19] with the established custom and usage of said confectionary trade in the County of Los Angeles, that the same was of merchantable quality and in all respects fit and proper for sale by defendant in its retail business.

III.

That the defendant relied upon said warranty and attempted to use said candy for the purpose aforesaid, but that the same, when offered for sale,

proved unfit for sale at retail in that it was moldy and otherwise unsuited for sale in defendant's retail business.

IV.

That as soon as said unfitness was ascertained, defendant notified the plaintiff thereof.

V.

That said fudge, as warranted, had a reasonable value to the defendant of 89c per pound for purposes of sale in defendant's retail business; that by reason of the unfitness of said candy for the purpose of sale at retail by defendant, defendant was and is damaged in the sum of $10,358.02.

For a third, separate and further Cause of Counterclaim, Defendant alleges:

I.

That the plaintiff, Bower-Giebel Wholesale Co., a co-partnership, composed of Earl E. Bower and Walter Hamilton Bower, is and has been for some time past engaged in the sale of candy and other confections in the County of Los Angeles.

II.

That the defendant, Sears-Roebuck and Co., is and has been for some time past engaged in the sale of general merchandise at [20] retail, including candy and confections, in the County of Los Angeles; that the plaintiff, knowing of the retail business in which the defendant was and is engaged and knowing that the defendant desired to

purchase candy to be used in defendant's retail business, on or about October 20th, 1943, sold 28,000 pounds of chocolate pecan fudge to be used by the defendant in said retail business to the knowledge of the plaintiff; and the plaintiff then and there expressly warranted the same to be of merchantable quality and in all respects fit and proper for such use.

III.

That the defendant relied upon said warranty and attempted to use said candy for the purpose aforesaid, but that the same, when offered for sale, proved unfit for sale at retail in that it was moldy and otherwise unsuited for sale in defendant's retail business.

IV.

That as soon as said unfitness was ascertained, defendant notified the plaintiff thereof.

V.

That said fudge, as warranted, had a reasonable value to the defendant of 89c per pound for purposes of sale in defendant's retail business; that by reason of the unfitness of said candy for the purpose of sale at retail by defendant, defendant was and is damaged in the sum of $10,358.02.

For a fourth, separate and further Cause of Counterclaim, defendant alleges:

I.

That the plaintiff, Bower-Giebel Wholesale Co., a co-partnership, composed of Earl E. Bower and

Walter Hamilton Bower, is and [21] has been for some time past engaged in the sale of candy and other confections in the County of Los Angeles.

II.

That the defendant, Sears-Roebuck and Co., is and has been for some time past engaged in the sale of general merchandise at retail, including candy and confections, in the County of Los Angeles; that on or about October 20th, 1943, the plaintiff offered to sell to the defendant 28,000 pounds of chocolate pecan fudge, and then and there produced and exhibited to the defendant certain samples of such chocolate pecan fudge so to be purchased by the defendant, and as an inducement to the defendant to make such purchase warranted and agreed that the 28,000 pounds of chocolate pecan fudge should be in all respects equal to the said samples.

III.

That the defendant, after examining said samples, purchased of the plaintiff 28,000 pounds of chocolate pecan fudge, and relying upon the plaintiff's said warranty and representation, agreed to pay therefor the sum of $15,400.00.

IV.

That during the period from November 16th, 1943, until on or about December 6th, 1943, plaintiff delivered to and defendant accepted the delivery of said 28,000 pounds of chocolate pecan fudge; that upon examination defendant found and discovered that a substantial part of said fudge did not con-

form in quality to the sample and was not of merchantable quality but was in fact unsuitable and unfit for sale by defendant in its retail business.

V.

That defendant notified plaintiff of the character and condition of said candy as aforesaid; that defendant refused to take any action with reference to the candy. [22]

VI.

That said chocolate pecan fudge had a reasonable value of 89c per pound to defendant in its retail business if it was of a merchantable quality and free from defect, as shown by the sample; that by reason of its defective character and the failure of the 28,000 pounds of candy to conform with the quality and character of the sample, defendant was and is damaged in the sum of $10,358.02.

Wherefore, defendant prays judgment against the plaintiff in the sum of $10,358.02, with interest thereon at the rate of 6% per annum, for costs of suit incurred herein, and for such other and further relief as to the court may seem just and proper in the premises.

JOHN L. WHEELER,
Attorney for Defendant

Dated: June 8th, 1944.

(Duly verified.)

(Acknowledgment of Service attached.)

[Endorsed]: Filed June 9, 1944. [23]

[Title of District Court and Cause.]

REPLY TO COUNTER-CLAIM

Comes Now the Plaintiff and replying to the Counter-claim of the defendants, admit, denies and alleges:

I.

Answering Paragraph I of the First counter-claim, plaintiff admits each and every allegation contained therein.

II.

Answering Paragraph II of the First counter-claim, plaintiff denies generally and specifically each an devery allegation contained in the last clause, beginning at Line 27, Page 3 of said Paragraph and further denies that they made any warranty of any type or description in connection with said merchandise; further answering said Paragraph, plaintiff admits all other allegations contained therein.

III.

Answering Paragraph III of the First counter-claim, plaintiff denies generally and specifically each and every allegation contained therein [26] and in this respect allege that the defendant relied solely upon their experience in connection with the sale of similar merchandise.

IV.

Answering Paragraphs IV and V of the First counter-claim, plaintiff denies generally and specifically each and every allegation contained therein and further denies that defendant was damaged in the sum of $10,358.02 or any other sum or at all.

V.

Answering Paragraph I of the Second Cause of counter-claim, plaintiff admits the allegations contained therein.

VI.

Answering Paragraph II of the Second Cause of counter-claim, plaintiff denies generally and specifically each and every allegation contained in the last clause, beginning at Line 32, Page 4 of defendants Answer and counter-claim; further answering said Paragraph, plaintiff admits the other allegations contained therein.

VII.

Answering Paragraph III of the Second cause of counter-claim, plaintiff denies generally and specifically contained therein and in this respect allege that the defendant relied solely upon their experience in connection with the sale of similar merchandise.

VIII.

Answering Paragraph IV of the Second cause of counter-claim, plaintiff denies generally and specifically each and every allegation contained therein and further denies that defendant was damaged in the sum of $10,358.02 or in any other sum or at all.

IX.

Answering Paragraph I of the Third cause of counter-claim, plaintiff admits the allegations contained therein.

X.

Answering Paragraph II of the Third cause of counter-claim, plaintiff denies generally and specifically each and every allegation contained [27] in the last clause, beginning at Line 7, Page 6 of defendants Answer and counter-claim; further answering said Paragraph, plaintiff admits the other allegations contained therein.

XI.

Answering Paragraph III of the Third cause of counter-claim, plaintiff denies generally and specifically each and every allegation contained therein and in this respect allege that the defendant relied solely upon their experience in connection with the sale of similar merchandise.

XII.

Answering Paragraph IV of the Third cause of counter-claim, plaintiff denies generally and specifically each and every allegation contained therein and further denies that defendant was damaged in the sum of $10,358.02 or in any other sum, or at all.

XIII.

Answering Paragraph I of the Fourth cause of counter-claim, plaintiff admits each and every allegation contained therein.

XIV.

Answering Paragraph II of the Fourth cause of counter-claim, plaintiff denies generally and specifically each and every allegation contained in the

last clause, beginning at Line 11, Page 7 of said Paragraph and further denies that they made any warranty of any type or description in connection with said merchandise; further answering said Paragraph, plaintiff admits all other allegations contained therein.

XV.

Answering Paragraph III of the Fourth cause of counter-claim, plaintiff admits that defendant examined the samples and purchased the fudge therein described and further admit that defendant agreed to pay therefor, the sum of $15,400.00; further answering said paragraph, plaintiff denies generally and specifically each and every other allegation contained therein.

XVI.

Answering Paragraph IV of the Fourth cause of counter-claim, plaintiff admits that it delivered and defendant accepted delivery of the said [28] 28,000 pounds of chocolate pecan fudge between November 16th, 1943, and December 6th, 1943, but further answering said Paragraph the plaintiff denies generally and specifically each and every other allegation contained therein.

XVII.

Answering Paragraph V and VI of the Fourth Cause for counter-claim, plaintiff denies generally and specifically each and every allegation contained therein and further denies that defendant was damaged in the sum of $10,358.02 or in any other sum, or at all.

As and For an Affirmative Defense to the Counter-Claim and Each and All of Them, Plaintiff Alleges:

I.

That defendant has been in the retail business for many years and during its experience has retailed similar items to the one herein involved and defendant is familiar with its characteristics and with the case that should be exercised in preserving such merchandise.

II.

That if any of the candy referred to in each of the counter-claims contained in defendants answer was unfit, unsalable or not in merchantable condition or quality, such fact was a sole, direct and proximate result of the defendants negligence in handling same after they received and accepted same.

As and For a Second, Separate and Affirmative Defense to the Counter-Claim and Each and All of Them, Plaintiff Alleges:

I.

That each and all of said counter-claims fail to state a Cause of action for counter-claim.

As and For a Third, Separate and Affirmative Defense to the Counter-Claim and Each and All of Them, Plaintiff Alleges:

I.

That each and all of the counter-claims are barred by laches.

As and For a Fourth, Separate and Affirmative Defense to the Counter-Claim and Each and All of Them, Plaintiff Alleges: [29]

I.

That defendants waived its claims, if any they had, by their acts and conduct after receiving and accepting the merchandise described in each and all of said counter-claim.

As and For a Fifth, Separate and Affirmative Defense to the Counter-Claim and Each and All of Them, Plaintiff Alleges:

I.

That defendant is estopped from now asserting each and every claim set forth in its counter-claim and each and all of them by reason of their acts and conduct after receiving, accepting and examining the merchandise described in said counter-claim.

Wherefore: Plaintiff prays Judgment be rendered in favor of Plaintiff upon its complaint on file herein and against the defendant and that defendant take nothing by virtue of its counter-claim on file herein.

(Signed) JEROME D. ROLSTON

Attorney for Plaintiff

(Duly Verified.)

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Aug. 11, 1944. [30]

[Title of District Court and Cause.]

DECISION AND ORDER FOR JUDGMENT

The above-entitled cause, heretofore tried, argued and submitted, is now decided as follows:

Judgment is ordered for the defendant on its counter-claim for the sum of $5320.00, representing the difference between the price paid,—fifty cents per pound—and the value of the rejected candy to the defendant and counter-claimant,—namely, sixty-nine cents per pound.

I am of the view that whether the facts are considered on the basis of the warranty of fitness under the California Code [California Civil Code, Sec. 1735, Subdivision 2] or the express conditions of the purchase order, or whether they be considered as a sale by sample [under Section 1736 of the California Civil Code], the candy rejected was not merchantable and was not up to standard or sample. The evidence is quite clear that the shipment to defendant was [33] part of another and larger shipment by the manufacturer to the plaintiff, that the plaintiff, on the basis of the very deficiencies of which the defendant complained, made complaint to the manufacturer who made a substantial adjustment in the price of the candy. In fact, I am of the view that but for the fact that the plaintiff here felt they were injured by what they called the defendant's waiver, no question would have been raised as to the defendant's claim. It is inconceivable that a wholesaler should receive an adjustment from a manufacturer

and not pass it on to the retailer. It was quite apparent during the trial of the case that the reason this was not done here was because the plaintiff, and especially Mr. Bower, felt that the adjustment was made after payments by the defendant on certain invoices had been allowed to go through. And plaintiff's chief witness (Mr. Bower) felt that the adjustment did not include the candy sent to the defendant, because the invoices for them had been paid. But the evidence of the witness Pocius, the representative of the manufacturer, who came here from Chicago for the purpose, clearly showed that the adjustment was as to the whole shipment including the shipment to the defendant. Mr. Pocius testified that rather than pick up all invoices, some of which had been paid, in order to make an adjustment, they agreed on two flat rates as a basis for adjustment on the invoices which had not been paid. The attitude of the plaintiff was, no doubt, motivated by the thought that the defendant, by continuing to accept candy, after complaint was made and by endeavoring to remedy the wetness of the candy by exposing it to the open air, as suggested by the sales representatives of the manufacturer, had waived the defect and that thereafter, in accepting the candy, they [34] agreed to take it "as is." But there is no legal foundation for such doctrine. On the contrary, the California law states specifically that acceptance shall not bar recovery of damages. [California Civil Code, Sec. 1769] And the plaintiff had ample notice of the defendant's dissatisfaction with the candy.

The defendant's willingness, during the holiday season, to try to remedy the condition, if it could be remedied, is not evidence of waiver of the defects. It is merely evidence of a desire to be fair in the matter. The plaintiff was given ample notice of the condition of the candy. That these conditions were real is evidenced by the testimony of the managers of practically every candy department in the various branches of the defendant's stores. Corroboration of this is given by Mr. Pocius, the representative of the manufacturer, who frankly admitted on the stand that they had manufactured this candy without taking into consideration California's climatic conditions. On the basis of this conviction, he made his adjustment with the plaintiff. Corroboration of this condition of the candy is also contained in the testimony of the sales agents of the manufacturer (Ehrhart and Mitchell) who, when the complaints arose, inspected the candy and saw and reported its condition.

Plaintiff's attempt to show that the manufacturing concern was, in some way, owned or controlled by the defendant was unsuccessful. There is no relation between the two, except, that of manufacturer and supplier, and even as to that, the relationship is not exclusive. Nor does the evidence warrant the intimation that perhaps the candy became wet or moldy because of the manner in which it was kept. The evidence clearly showed that it was kept in unheated, [35] cool warehouses and that the stacks were not piled so high as to account for the condition.

Hence the conclusion that the defendant is entitled to recover and that its right of recovery is not barred either by failure to give proper notice or by waiver of such notice after it was given.

At the same time, I am of the view that, under the provisions of Subsection 6 and 7 of Section 1789 of the California Civil Code, the recovery should be limited to the difference between the price paid and the reduced price of 69 cents, which was adopted after the Christmas holidays. It may well be true that when the sale was made, it was understood that the candy was to be resold at 89 cents and that this price had to be cleared with OPA, on the basis of prior sales in Chicago, and that when such an understanding exists, the difference between the resale price and the price paid represents the value to the buyer. However, the evidence is quite clear that the reduction to 69 cents was unrelated to the quality of the candy. The defendant did not sell any wet or moldy candy.

On the contrary, some of the defendant's managers testified that it is customary to reduce the price of candy after the holidays.

This was more to be expected in the case of a high quality of merchandise, of the type which the defendant did not ordinarily sell in its candy department.

Hence the conclusion that the recovery should be limited to the difference between the price paid and the price at which the candy was being sold when

the defendant finally gave up the attempt to sell it and stored the balance as unmerchantable.

Because of the earnestness of counsel in the presentation [36] of the case, I have stated these grounds of decision. I may add that I have considered all the other matters, legal and factual, raised by the plaintiff at the trial and in its brief, and I find them not well taken.

Formal findings and judgment in conformity with these views will be prepared by counsel for the defendant under local rule No. 7.

Dated this 24th day of February, 1945.

(Signed) LEON R. YANKWICH
Judge

Counsel notified.

[Endorsed]: Filed Feb. 24, 1945. [37]

[Title of District Court and Cause.]

OBJECTIONS TO PROPOSED FINDINGS OF FACTS AND CONCLUSIONS OF LAW AND JUDGMENT

I.

Plaintiff objects to Paragraph III of the proposed findings and particularly to that portion thereof found on lines 24 to 26 inclusive.

The basis of this objection is that there is no evidence of any expressed warranty in any regard whatsoever disclosed by any of the evidence.

II.

Plaintiff objects to Paragraph IV of said findings and to each and every statement therein contained.

The reasons for this objection are as follows:

(a) Construing the evidence most favorable to the defendant, the evidence still clearly discloses that approximately Two-Thirds (2/3rds) of the candy was merchantable and conformed [38] in quality and condition to the samples, and that, at the most, there was only 9620 pounds that the Court could find was unmerchantable or non-conforming.

(b) That in said finding, beginning on line 8 through 12, the finding is not a finding of fact, but rather a conclusion concerning the words "immediately notified." At this point, the facts should be found from which the Court may conclude that notice was given.

(c) The balance of said paragraph is objectionable as being outside of the issues and was not a fact found by the Court, and is not necessary for the Court's judgment.

III.

Plaintiff objects to Paragraph V of said findings found on pages 3 and 4 for the following reasons:

(a) The testimony clearly showed that defendant was able and did examine all of the candy upon receipt of it, and was further able to determine whether or not the candy was merchantable and in conformance with samples.

(b) There is no evidence that plaintiff requested

defendant to continue to accept further shipments, but to the contrary, the evidence discloses that the manufacturers representatives made the request, if the testimony could be construed as to constitute a request.

(c) The evidence does not support the conclusion found in lines 28 through 30, concerning the continuous advice of the quality of the merchandise.

(d) There is no evidence, at any time, supporting the alleged finding that the defendant advised plaintiff that plaintiff would have to pay defendant's losses for such unmerchantable portions of said candy.

(e) The balance of said paragraph, beginning with line [39] 32 on Page 3 and continuing to the end thereof, is a conclusion and is not properly a finding of fact.

IV.

Plaintiff objects to Paragraph VI of said findings, in that it is entirely immaterial and irrelevant and was not properly admitted into evidence and should not be included in the findings.

V.

Plaintiff objects to Paragraph VII of said findings, and particularly to the second sentence thereof, beginning on line 18 and ending on line 21 of Page 4. The reason for this particular objection is that it is a conclusion and not a finding and that the date of the purported notice is not set forth, and the evidence does not support the alleged request for payment of damage.

Further objecting to the second paragraph of said finding, the whole thereof is a conclusion and is not in accord with the informal Order which was heretofore rendered by the Court.

VI.

Plaintiff objects to Paragraph VIII of said findings, in that it is compound and further does not correctly set forth the stipulation of the parties, which stipulation included interest at the rate of 7% per annum from January 14, 1944. The second sentence of said findings is also a conclusion and is not a finding of fact, and, if construed as a finding of fact, should be separately stated.

VII.

Plaintiff objects to Paragraphs IX, X, XI, XII, XIII and XIV for the reason that they all state what might be a proper conclusion of law, but do not set forth the facts which are to [40] be found to support such conclusion.

VIII.

Plaintiff objects to the Conclusions of Law for the following reasons:

(a) It does not take into account the interest which was stipulated insofar as the plaintiff's case was concerned.

(b) That it is not in conformance with the informal Order and judgment indicated by the Court.

(c) That defendant is not entitled to costs, in that judgment went in favor of the plaintiff.

IX.

Plaintiff objects to the proposed Judgment for each and every reason hereinabove specified as being the basis of the objections to the Conclusions of Law.

Dated this 28th day of March, 1945.

(Signed) JEROME D. ROLSTON
Attorney for Plaintiff

(Acknowledgment of Service.)

[Endorsed]: Filed March 28, 1945. [41]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on for trial on January 9th, 1945, before the Hon. Leon R. Yankwich, Judge presiding without a jury, a jury trial having been duly and regularly waived by the respective parties, and the plaintiff and defendant Sears, Roebuck and Co. being present in court and being represented by their respective attorneys of record, and evidence, both oral and documentary, having been offered and received, and the Court being fully advised in the premises, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

I.

Jurisdiction in this cause is based upon diversity of citizenship. Plaintiff is and was, at the time

of the commencement of the above-entitled action, a co-partnership doing business in the County of Los Angeles, State of California, and being composed of Earl E. Bower and Walter Hamilton Bower, citizens and residents of the State of California. Defendant, Sears, Roebuck and Co., is and was at the time of the commencement of the above-entitled action, a citizen and resident of the State of New York. The amount in controversy exceeds the sum of $3,000, exclusive of interest and costs.

II.

Plaintiff is and for some time prior to the commencement of this action, was engaged in the sale of candy and other confections at wholesale in the City and County of Los Angeles.

III.

Defendant is and for some time prior to the commencement of this action, was engaged in the sale of general merchandise, including candy and confections, at retail throughout the United States, including the City and County of Los Angeles. Defendant, on or about October 20th, 1943, purchased by description and by sample from the plaintiff, 28,000 pounds of chocolate pecan fudge candy at 55c a pound to be sold by defendant in its retail business to the knowledge of the plaintiff. Plaintiff expressly warranted that said candy would be of merchantable quality and would be in all respects fit and proper for sale in defendant's retail business. Plaintiff further immediately warranted that such candy would be of merchantable

quality, would conform in quality to the samples shown to defendant, and would be otherwise free from defects rendering said candy unsaleable in defendant's retail business.

At the time of said sale, there did not exist in the County of Los Angeles any established custom or usage in the [44] confectionery trade by which plaintiff warranted that said candy was of merchantable quality and fit for sale by defendant in its retail business.

IV.

The candy delivered to defendant by plaintiff was not of merchantable quality, was not fit for sale in defendant's retail business, and did not conform in quality or condition to the samples submitted to defendant at the time it purchased the candy. Defendant, upon discovery of the unmerchantable quality and condition of said candy and that it did not conform to the quality of the samples, immediately notified the plaintiff that the candy was of unmerchantable quality and condition and did not conform to the samples. At the time defendant purchased said candy and at the time defendant first gave notice to the plaintiff that such candy was of unmerchantable quality and did not conform to the samples, said candy, if it had been as warranted and if it did conform to the samples, had a reasonable value to the defendant of 89c a pound in its retail business.

V.

Delivery of said candy was made to defendant in a number of shipments. Defendant was unable

to examine all of the candy to determine whether all of said shipments of said candy would be of unmerchantable quality and would not conform to the samples. At plaintiff's express request, defendant continued to accept further shipments of candy until the entire 28,000 pounds had been received. Defendant paid the full purchase price of $15,400 for said candy. Defendant continuously advised plaintiff of the unmerchantable quality of substantial portions of the shipments of candy as such shipments were received and further, advised plaintiff that it would be required to pay defendant's losses for the unmerchantable portions of said candy. Defendant did not at any time [45] expressly or impliedly agree with plaintiff to discharge plaintiff from its liability in damages to defendant for breaches of said warranty. Defendant stored said candy in a careful and proper manner in its retail stores and sold at retail all of said candy that was of merchantable quality.

VI.

Plaintiff purchased said candy sold to defendant from the manufacturer thereof as a part of a larger quantity of said candy. Plaintiff and the manufacturer of said candy agreed upon and plaintiff received a substantial settlement from the manufacturer because of the unmerchantable quality of said entire quantity of candy, including that sold to defendant.

VII.

Of said 28,000 pounds of candy sold to defendant

by plaintiff, 9,620 pounds were of unmerchantable quality, did not conform in quality to the samples, and were unfit for sale in defendant's retail business. Defendant notified plaintiff that said 9,620 pounds of candy were unmerchantable and unfit for sale in defendant's retail business and requested plaintiff to pay for the damage suffered by defendant by reason of the breaches of said warranties. At the time defendant notified plaintiff that said 9,620 pounds of candy were unmerchantable, said candy, if it had been as warranted had a reasonable value to defendant in its retail business of 69c a pound.

Defendant, having paid in full for said candy, was damaged by breach of said warranties in the sum of 69c a pound for each of said 9,620 pounds, or in the total sum of $6,637.80.

VIII.

Plaintiff sold to defendant other merchandise of a reasonable value of $7,738.99. Defendant has held said sum as an offset [46] to the liability of plaintiff to defendant for the breach of warranties, as aforesaid. Defendant is entitled to offset against said sum of $7,738.99 its damage in the sum of $6,637.80.

IX.

Defendant is not barred from asserting its claims for damage for breaches of said warranties by its laches.

X.

Defendant did not waive its claims for damage

for breaches of said warranties by its acts or conduct at any time or in any manner.

XI.

Defendant did not estop itself from asserting its claims for damage for breaches of said warranties by its acts or conduct at any time or in any manner.

XII.

Except as herein elsewhere expressly found to the contrary, all of the allegations of defendant's first, second, third and fourth separate and distinct causes of counterclaim are true.

XIII.

Except as herein elsewhere expressly found to the contrary, all of the allegations of plaintiff's complaint are untrue.

XIV.

Except as herein elsewhere expressly found to the contrary, all of the allegations of plaintiff's reply to the counterclaim are untrue. [47]

CONCLUSIONS OF LAW

Plaintiff is entitled to a judgment in the sum of $1,101.19, and defendant is entitled to its costs incurred in said action.

Dated April 2, 1945.

(Signed) LEON R. YANKWICH,
Judge of the District Court.

(Acknowledgment of Service.)

[Endorsed]: Filed April 2, 1945. [48]

In the District Court of the United States, Southern District of California, Central Division.

No. 3676-Y Civil

BOWER-GIEBEL WHOLESALE CO., a copartnership composed of EARL E. BOWER and WALTER HAMILTON BOWER,

Plaintiff,

vs.

SEARS, ROEBUCK AND CO., a corporation, DOE ONE and DOE TWO,

Defendants.

JUDGMENT

The above-entitled cause came on regularly for trial on January 9th, 1945, before the Hon. Leon R. Yankwich, Judge presiding without a jury, jury trial having been duly and regularly waived by the respective parties, and the plaintiff and defendant, Sears, Roebuck and Co. being present in court and being represented by their respective attorneys of record, and evidence, both oral and documentary, having been offered and received, and the Court being fully advised in the premises,

Now, Therefore, It Is Ordered, Adjudged and Decreed, that said causes of action as to Doe One and Doe Two be dismissed; that the plaintiff Bower-Giebel Wholesale Co., a copartnership composed of Earl E. Bower and Walter Hamilton Bower, have and recover the [50] sum of $1,101.19 from the defendant, Sears, Roebuck and Co., a

corporation; and that defendant, Sears, Roebuck and Co., a corporation, have and recover judgment against the plaintiff for its costs of suit in the sum of $83.05.

Dated: April 2, 1945.

LEON R. YANKWICH,
Judge of the District Court.

(Acknowledgment of Service attached.)

[Endorsed]: Filed April 2, 1945. [51]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes now the plaintiff, Bower-Giebel Wholesale Company, a co-partnership, and makes this its motion for a new trial upon the following rounds:

(1) That inadequate damages were allowed to the plaintiff appearing to have been given under the influence of prejudice or passion;

(2) That the evidence was insufficient to justify the decision and judgment in the following specifications:

(a) The judgment should be for the plaintiff in the sum of $7,738.99, together with interest at the rate of 7% per annum from January 14, 1944, against which the Court apparently has allowed a set-off in the sum of $6,637.80;

(b) The evidence is insufficient to support the

finding and conclusion that [53] notice of any alleged defect was given to the plaintiff with sufficient timeliness and clarity as required by the laws of the State of California and of the United States Court;

(c) That the evidence is insufficient in failing to disclose any cause for the alleged defectiveness of the merchandise involved;

(d) That the evidence is insufficient to support the damages allowed on the counter-claim in that the defendant failed to set forth all of the elements of said alleged damage.

(3) Errors in law occurring at and during the trial, to-wit:

(a) All evidence of other adjustments of candy other than that delivered to the defendant was not properly admitted as in being proof of whether or not candy delivered to the defendant was defective or to prove any other issue before the Court;

(b) The evidence clearly shows that the defendant, by their conduct, statements and actions, were estopped from claiming any breach of warranty.

(c) That the Court did not properly apply the measure of damages and loss of profits;

(d) That the Court erred in finding that there was any express warranty;

(e) That the Court erred in finding [54] that

defendant notified plaintiff of any breach of warranty;

(f) That the Court erred in finding that there was any express request by plaintiff for deferment to continue to receive further shipments;

(g) That the Court erred in finding that plaintiff would be required to pay defendants' losses for the unmerchantable portion of the product delivered;

(h) That the Court erred in making any finding whatsoever with regard to any adjustments made between plaintiff and the manufacturer involving candy other than that delivered to the defendant.

This motion shall be heard upon the pleadings and all papers on file and upon the minutes of the Court, and upon all exhibits introduced during the trial of said cause, and upon all evidence introduced during the trial of the above-entitled cause.

Dated this 10th day of April, 1945.

(Signed) JEROME D. ROLSTON,

Attorney for Plaintiff.

(Affidavit of Service by mail attached.)

[Endorsed]: Filed April 11, 1945. [55]

At a stated term, to-wit: The September Term, A. D. 1945, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday, the 10th day of September in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable: Leon R. Yankwich, District Judge.

[Title of Cause.]

This cause coming on for hearing motion of plaintiff for a new trial, and there being no appearances at 10 A. M. it is ordered that the cause be, and it hereby is, continued to 2 P. M. for the said proceedings.

At 2 P. M. court reconvenes in this case, Jerome D. Rolston, Esq., appearing as counsel for the plaintiff; John L. Wheeler, Esq., appearing as counsel for the defendant; Attorney Rolston argues in support and Attorney Wheeler argues in opposition. It is ordered that the motion is denied.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Sears, Roebuck and Co., Defendants Herein, and to John L. Wheeler, Their Attorney, and to Edmund L. Smith, Clerk of the Above Entitled Court:

You, and Each of You, Will Please Take Notice,

that plaintiff herein, Bower-Giebel Wholesale Company, a co-partnership composed of Earl E. Bower and Walter Hamilton Bower, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the second day of April, 1945, and from the Order of the above entitled Court denying plaintiff's Motion for New Trial which Order is entered on the tenth day of September, 1945.

Dated this 8th day of December, 1945.

JEROME D. ROLSTON,
Attorney for Plaintiff.

[Endorsed]: Filed Dec. 8, 1945. [58]

[Title of District Court and Cause.]

STIPULATION RE RECORD ON APPEAL

It Is Hereby Stipulated By and Between the Parties Hereto, by and through their respective counsel that the following documents may be docketed with the Circuit Court of Appeals for the Ninth Circuit in connection with the plaintiff's appeal in the above entitled matter:

1. Plaintiff's Complaint.

2. Defendants' Answer and Counter Claim.

3. Plaintiff's reply to Counter Claim.

4. Decision and Order for Judgment.

5. Findings of Fact and Conclusions of Law.

6. Objections to Proposed Findings of Fact and Conclusions of Law.

7. Judgment.

8. Motion for New Trial. [59]

9. Notice of Appeal.

10. Typewritten transcript of all of the testimony during the course of trial.

It Is Further Stipulated that all Exhibits introduced by either party during the course of trial may be submitted to the Appeal Court in their original form.

It Is Further Stipulated that no Appeal Bond need be filed by the appellant.

Dated this 12th day of January, 1946.

(Signed) JOHN L. WHEELER,
Attorney for Defendant.

(Signed) JEROME D. ROLSTON,
Attorney for Plaintiff and Appellant.

It is so ordered.

Dated: January 14, 1946.

LEON R. YANKWICH,
Judge.

[Endorsed]: Filed Jan. 14, 1946. [60]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing

pages numbered from 1 to 60 inclusive contain full, true and correct copies of Complaint; Petition for Removal; Bond on Removal; Minute Orders of the Superior Court dated May 11, 1944 and May 15, 1944 respectively Order of Removal to United States District Court; Certificate of Clerk of the Superior Court to Removal Papers; Answer to Complaint and Counter-Claim; Reply to Counter-Claim; Decision and Order for Judgment; Objections to Proposed Findings of Fact, Conclusions of Law and Judgment Findings of Fact and Conclusions of Law; Judgment; Motion for New Trial; Minute Order Entered September 10, 1945 Notice of Appeal and Stipulation re Record on Appeal which, together with copy of Reporter's Transcript and Original Exhibits, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to $16.45 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 16th day of January, 1946.

[Seal] EDMUND L. SMITH,
Clerk

THEODORE HOCKE
Chief Deputy Clerk.

In the District Court of the United States for the Southern District of California, Central Division.

Hon. Leon R. Yankwich, Judge Presiding.

No. 3676-Y.

BOWER-GIEBEL WHOLESALE COMPANY,
Plaintiff,

vs.

SEARS, ROEBUCK AND COMPANY,
Defendant.

REPORTER'S TRANSCRIPT OF TESTIMONY AND PROCEEDINGS ON TRIAL

Appearances: Jerome D. Rolston, Esq., for the Plaintiff. John L. Wheeler, Esq., for the Defendant.

Los Angeles, California,
Tues, January 9, 1945, 10 A.M.

Mr. Wheeler: We are ready to stipulate to plaintiff's case in chief, and go ahead on the counterclaim, with one exception there is no stipulation of the account stated.

The Court: You have two causes of action, first for money, claiming the sale of merchandise, $7738.99, and a claim for interest from January 14, 1944. The second cause of action is account stated.

Mr. Wheeler: Open book account. The third is account stated.

Mr. Rolston: The third may be abandoned; and the second stipulation as to proof, that that is the

correct balance between the parties. The only question is as to the supposed warranties under the counter-claim. Is that right, Mr. Wheeler?

Mr. Wheeler: That is correct.

Mr. Rolston: Before we proceed, we have several documents we may want to refer to, so far as the open book account, being pages of the ledger, as well as copies of invoices, and we ask that they be marked for identification, so the foundation will be there. This is a group of six pages of the ledger account.

The Clerk: Plaintiff's 1 for identification.

Mr. Rolston: And 18 copies of invoices as Plaintiff's—— [2*]

The Clerk: Plaintiff's 2 in evidence.

RALPH PARKER ASHBY,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Your name, sir?

The Witness: Ralph Parker Ashby.

Direct Examination

Q. Mr. Ashby, you are a resident of Los Angeles? A. Lynwood.

Q. How long have you resided in Los Angeles County? A. 24 years.

Q. What is your present employment?

A. Buyer for Sears, Roebuck and Company.

Q. How long have you been so employed?

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* Page numbering appearing at top of page of original Reporter's Transcript.

Testimony of Ralph Parker Ashby.)

A. Five years.

Q. Did you have any prior employment with Sears, Roebuck and Company, before you became a buyer? A. I did not.

Q. In what department or division are you a buyer?

A. I am a buyer of food and drug products.

Q. During the period from October, 1943, through March of 1944, what was your function?

A. At that particular time I was buyer of candy products almost entirely.

Q. For any particular division of the company?

A. The Los Angeles group of retail stores.

Q. Calling your attention to a transaction involving Pan O'Butter Fudge, Mr. Ashby, I will ask you with whom you first discussed this matter.

A. Do you mean in reference to the Bower-Giebel Company?

Q. With anyone.

A. The first discussion of the fudge was over the phone with Mr. Bower.

Q. When was that conversation?

A. To the best of my knowledge it was October 21st.

Q. What year? A. 1943.

Q. Did you know Mr. Bower?

A. Yes, we had considerable dealings before this time.

Q. With reference to the purchase of candy?

A. With reference to the purchase of candy items, yes.

Testimony of Ralph Parker Ashby.)

Q. What was the telephone conversation between you and Mr. Bower at that time?

A. Mr. Bower called me and stated he had two gentlemen in his office who had quite a large quantity of fudge for sale, [4] and wanted to know if I would be interested. I said I would be. He wanted to know whether I could come down. I said I would be down within the next hour or so.

Q. Was there any further conversation that you recall? A. Over the phone?

Q. Yes. A. No.

Q. Did you go to his office?

A. I went to his office, yes.

Q. Whom did you meet there in his office?

A. I was introduced to two gentlemen by Mr. Bower, by the name of Erhardt and Mitchell.

Q. Do you recall Mr. Erhardt's first name?

A. It did not come up until later, but later I learned it was Alphonse.

Q. Did you learn Mr. Mitchell's first name?

A. I later learned, in the course of conversation, he was called Bob. I assume that is his name.

Q. Were there any other persons present at the time of this meeting?

A. Well, various people in the office, but not directly engaged in business matters under discussion.

Q. Will you relate the conversation that took place at that time with reference to Pan O' Butter Fudge?

A. As I recall it, Mr. Bower showed me a sam-

(Testimony of Ralph Parker Ashby.)

ple of what [5] purported to be Pan O' Butter Fudge. He stated this was fudge these gentlemen had for sale, and it looked pretty good to him, and what did I think of it? By the appearance of it, it looked pretty good to me. I said, "Approximately what would it cost?" And he said around 60c a pound. Then I asked him what was in the fudge, and while Mr. Bower himself did not answer that directly, the other gentlemen who were selling the merchandise explained what was in it. They showed me the label on the fudge, which backed up their claim that it contained real butter, top quality pecan nuts, and the proper amount of sugar and seasoning, and various other ingredients that go into fudge. Judging from that, and, as I say, that it looked——

Mr. Rolston: I objected to any voluntary statements not part of the conversation.

The Court: He is relating the conversation. What did you do? Don't give us your thought; just say what was said.

A. After what the gentlemen pointed out as the ingredients of the fudge, and it was on their label backing up what they said, and the appearance of the fudge was good, I then brought up the matter of price. Mr. Bower and I went back and forth on that, finally agreed it would be a 55c price, which would be the price we would pay. Then he came to discussion of the quantity. We discussed various [6] amounts, and finally we came out for the purchase by Sears, Roebuck and Company to be 28,000

pounds, which was, roughly, half a carload. Having done a lot of business with Mr. Bower, I felt, as long as I was buying it through him——

Mr. Rolston: One minute——

The Court: No.

A. After the discussion of the price I then wrote out a purchase order, and at the same time we wrote the purchase order we talked about them getting an OPA approval on this price. They said they would get this, so I gave them the purchase order, which specified the date the transaction took place, which was October 21st, and the delivery date, which the purchase order will show, was November 6th. We shook hands, and I went back to my office.

Q. By Mr. Wheeler: Mr. Ashby, with reference to this fudge that was there, what was its size.

A. Size?

Q. Yes; what was the size or quantity of fudge?

A. There was a slab. I don't know whether that was the exact weight, but I would say in the neighborhood of 10 pounds. I did not pick it up.

Q. What was its appearance?

A. The appearance was very fine.

Q. Did you make an examination of the fudge?

A. Yes, a portion of the fudge was cut off. I took that [7] sample back to my office.

Q. What did you observe during the cutting of the fudge?

A. We observed, during the cutting of the fudge, that it cut clean, which meant—when buying fudge,

Testimony of Ralph Parker Ashby.)

if the fudge cuts clean, and does not stick to the knife, that means the fudge has been cooked to a sufficient temperature; inasmuch as the cutting showed this was clean, it proved to me that the fudge was cooked to the proper consistency, and therefore was edible.

Q. Did you eat any of the fudge at that time?

A. No; I don't eat candy.

The Court: You just buy it for the other fellow?

A. That's right; I have sugar diabetes.

The Court: Don't apologize. I don't eat candy either. I don't like it.

Q. By Mr. Wheeler: You say you took a sample? A. That's right.

Q. What did you do with the sample, Mr. Ashby?

A. When we took the sample back to the office —we have a cabinet in the office where we keep all of these candy samples, food products samples, and so forth. I merely put it in with the other samples we had in the cabinet.

Q. Did you at any subsequent time examine that sample?

A. Yes. Our normal practice is, between Christmas [8] and New Years——

Mr. Rolston: I am going to object to any normal practice.

A. Our practice, between Christmas and New Years, is to clean out——

Testimony of Ralph Parker Ashby.)

Mr. Rolston: I am still objecting to any practice of any kind.

The Court: Don't tell us your practice. Tell us what you did.

A. Each New Years we always clean out the sample cabinet. I cleaned out the sample cabinet.

The Court: Go ahead.

A. That is a misstatement. I had my secretary do it, and she threw the sample out, along with all the other samples of food products that we had in the cabinet.

Q. By Mr. Wheeler: Did you example the sample at that time?

A. Yes, at that time I looked over that sample, plus others that were in there.

Q. What did you observe with reference to that sample at that time?

A. The sample of the fudge, while hard outside, was very good on the inside.

Q. What did you observe with reference to mold, if anything? [9]

A. There was no mold.

Q. What did you observe with reference to color, Mr. Ashby?

Mr. Rolston: I am going to object to the leading form of questions.

The Court: This man is experienced, Mr. Rolston. He can give a description of what he saw without splitting it up. Describe the condition in which you found the fudge, so far as edibility, and any other things, in relation to the fudge.

Testimony of Ralph Parker Ashby.)

A. The fudge, being exposed to the air, was naturally hard on the outside. Breaking it open, it was still moist on the inside, but there was no indication of mold in the sample.

Mr. Wheeler: I will show you——

The Clerk: Defendant's Exhibit A.

Q. By Mr. Wheeler: I will show you what purports to be a purchase order on a paper or form entitled "Sears, Roebuck and Co.", being No. R407215, and ask you if that is the purchase order which you prepared at the time in Mr. Bower's office?

A. This is the purchase order, with the purchase price, although the ink writing on there is not my writing.

Mr. Rolston: So stipulated; that ink portion was after Mr. Rolston gave the purchase order.

Mr. Wheeler: I offer that in evidence.

The Court: It may be received as cross-complainant's exhibit.

The Clerk: Exhibit A.

Q. By Mr. Wheeler: I call to your attention the date in the lefthand corner, Mr. Ashby, and I will ask you if the order was prepared on the date that the order bears? A. Yes.

Q. That date is——

A. This order was written down in the office. At the time the merchandise was bought the order was handed to Mr. Bower.

Q. That date is October 20, 1943?

A. Yes, apparently it is.

Testimony of Ralph Parker Ashby.)

Q. Mr. Ashby, during your relation of the conversation that you had on October 20th, you stated that you agreed upon a price of 55c. Was that per pound?

A. That was the price per pound, yes.

Q. Did you have any discussion, during that conversation, with reference to the pecans or nuts in the fudge? A. Yes.

Q. Will you state the conversation?

A. We merely asked that a few more pecans be put on top of the fudge, and a few more be ground up and scattered through it, to make it a little richer in nut content. [11]

Q. Did you have any discussion with reference to the delivery of the fudge?

Mr. Rolston: I am going to object to this form of question as leading and suggestive as to a conversation already related.

The Court: I don't think the question of the time of shipment has been gone into at all. There is no harm. The answer is either yes or no. Objection overruled. A. Yes.

Q. By Mr. Wheeler: What was the conversation you had with Mr. Bower with reference to the delivery, on October 20th?

A. I do not recall the exact words. I can give you the essence, if that is satisfactory.

Q. If you will state what your recollection is.

A. The essence of the conversation was that the merchandise had to be delivered before Christmas.

Q. Was there any further conversation with reference to delivery?

Testimony of Ralph Parker Ashby.)

A. No, not while I was there.

Q. Referring to the Pan O'Butter Fudge, when did you have the next discussion, or next conversation, with Mr. Bower concerning it?

A. Before answering that I would like to qualify it, if I may. [12]

The Court: All right.

A. I don't recall the exact date of the next conversation, because there was none, generally speaking, in reference to the fudge, other than the OPA price of the fudge.

Q. You did have some conversation, then, with Mr. Bower with reference to the OPA pricing of the fudge? A. That's right.

Mr. Wheeler: At this time I offer in evidence a letter dated November 13, 1943, on the stationery of the Karmel Korn Commissary, signed by O. Pocius, addressed to E. W. Bower.

Q. Mr. Ashby, I will ask you to examine the letter. Did you receive that letter?

A. This letter was given to me by Mr. Bower.

Q. Do you recall the date on which you received it? A. I don't recall the exact date.

Q. Do you recall the date with reference to the date that it bears? A. I don't understand.

Q. Can you recall whether it was prior to November 13th, or subsequent to November 13th?

A. This letter I see is dated November 13th. It was addressed to Mr. Bower; not to me. Mr. Bower handed it to me. I would say it was some time after November 13th.

Testimony of Ralph Parker Ashby.)

Mr. Wheeler: At this time I offer it in evidence.

The Clerk: Defendant's Exhibit B. [13]

The Court: It may be received as Defendant's Exhibit B.

Q. By Mr. Wheeler: Calling your attention to this letter, Mr. Ashby, I will ask you if the conversations which you had with Mr. Bower concerning the OPA pricing occurred prior to your receipt of the letter. A. Yes.

Q. What was the conversation that you had with him?

A. I said to Mr. Bower that the local OPA people were requiring some form of a letter from the manufacturer of the merchandise stating that it complied with OPA regulations, and I could not take delivery on the merchandise until I received this letter.

Q. Did you have any further conversations with Mr. Bower concerning the OPA regulation, after you received this letter?

A. Other than I explained. This letter complied with the regulations.

Q. After the receipt of the letter did you have any further conversation with Mr. Bower concerning Pan O' Butter Fudge? A. Yes.

Q. When was the next conversation that you had with him?

A. The next conversation in which the subject of Pan O' Butter Fudge came up was on or about November 25th. It could have been a day either way. [14]

Testimony of Ralph Parker Ashby.)

Q. Do you recall anything that occurred on the day that you had this conversation with Mr. Bower?

A. On this day I took down a sample of this Pan O' Butter Fudge to Mr. Bower's office and showed him the type of goods that was arriving against this order.

Q. You went to his office? A. Yes.

Q. What was the condition of fudge that you took to his office?

A. The condition of the fudge that I took was extremely moist, wet.

Q. What was its appearance?

A. Well, we——

Q. What was the conversation that you had with Mr. Bower at that time?

A. I said to Mr. Bower, "This is the type of merchandise we are getting", and something would have to be done about it.

Q. Was there any further discussion with reference to Pan O' Butter Fudge?

A. Mr. Bower agreed with me and said he would get hold of the representatives of the manufacturer to see what could be done.

Q. Did you have any further conversation with him at that time? [15]

A. There might have been further, but that is all I recall, unless you have something to refresh my memory.

Q. Did anyone call on you? A. Yes.

Q. And on what date was that call made?

A. Monday, November 29th.

Testimony of Ralph Parker Ashby.)

Q. Who called on you?

A. A Mr. Erhardt, the gentleman I had previously met in Mr. Bower's office.

Q. Where did you meet Mr. Erhardt?

A. In my office.

Q. What occurred in your office?

Mr. Rolston: To which I am going to object as immaterial; what occurred in the office in the absence of the other party would be hearsay.

Q. By Mr. Wheeler: What occurred would not be hearsay. I will reframe the question: Did you show Mr. Erhardt the candy, or any candy?

A. Yes.

Q. On the occasion of his visit? A. Yes.

Q. Where did you first show him the candy?

A. We had approximately 90 pounds in my office, which I showed him first.

Q. What was the condition of that fudge? [16]

A. This fudge was very soft. It would run together, and was beginning to mold.

Q. Did you show Mr. Erhardt any other fudge?

A. Yes.

Q. Where did you show him that fudge?

A. I took Mr. Erhardt to the stock room of the Boyle Street store, which was in the same building.

Q. Where was that stock room situated?

A. On the second floor of the building, located at 2650 East Olympic Boulevard, Los Angeles.

Q. Where was it, with reference to your office?

A. I would say approximately 100 yards away from my office in the center of the building. My

Testimony of Ralph Parker Ashby.)
office has windows, and the stock room is right in the center of the building.

The Court: It does not face the street?

A. No; directly in the center of the building. It has no outside windows at all.

Q. By Mr. Wheeler: It is a part of the warehouse space in the building?

A. That's right.

Q. Your offices are located in the office space of the building? A. That's right.

Q. What fudge did you show Mr. Erhardt at that time? [17]

A. The fudge that was in the cases was stacked up there. I merely asked Mr. Erhardt to pull out any case he wanted to. He selected four or five cases, and we opened those.

Q. What was the condition of the fudge?

A. The fudge in those cases was very wet, moist, and was beginning to run, and in some cases was starting to mold around the nuts.

Q. Did you have any conversation with Mr. Erhardt? A. Yes.

Q. What conversation did you have with him?

Mr. Rolston: To which I am going to object. Any conversation this witness had with Mr. Erhardt would be hearsay so far as the Bower-Giebel Wholesale Company is concerned.

Mr. Wheeler: If your Honor please, I think the testimony shows that this man was sent over.

The Court: He was directed to go over.

Testimony of Ralph Parker Ashby.)

Mr. Wheeler: He was directed to go over to see him.

Mr. Rolston: There is no showing he was a representative of ours.

The Court: But he acted as agent in the sale. You are responsible for what you sell.

Mr. Rolston: Responsible for what we sell; not responsible for what any person may say. [18]

The Court: If a man makes a complaint, and you send a man as a representative, he becomes your agent for the purpose of the conversation.

Mr. Rolston: I still object as hearsay. Anything said would be immaterial so far as we are concerned. He did not represent us.

The Court: He was sent there to get the complaint.

Mr. Rolston: He was sent as a representative of the factory. That was shown in Mr. Ashby's conversation.

The Court: Anyhow, he was sent to see Ashby. Sears, Roebuck and Company have no contractual relation with the factory.

Mr. Rolston: That is right.

The Court: The objection will be overruled.

Q. By Mr. Wheeler: What conversation did you have with Mr. Erhardt at that time?

A. I pointed out the condition of the fudge which Mr. Erhardt had himself selected from the sealed cases. Mr. Erhardt was very much concerned, and said that he would give me 90 pounds

(Testimony of Ralph Parker Ashby.)

to replace the 90 pounds that was in my office which, from his own examination, was not salable.

Mr. Rolston: One moment. I am going to object to that as the conclusion of this witness.

The Court: That may be stricken. Did he promise to give you 90 pounds? [19]

A. If I may break in there, I gave him an order for it, binding the promise.

Mr. Wheeler: We will come to that; but just relate the conversation that you had with Mr. Erhardt at that time.

A. Erhardt was going to give me——

The Court: Tell what was said.

A. Mr. Erhardt said, "I will give you 90 pounds of fudge to replace the fudge that you have there in your office, which I can see is unsalable." Mr. Erhardt suggested that we open up the cases of fudge to let them air and dry out before taking it down to the sales store. I stated that I would do this, but I still could not tell, unless we had gone through all the cases, the amount of the fudge that was unsalable; therefore I would go along with the 90 pounds' adjustment until we were able to check all the cases, and find out exactly how much was unsalable.

Q. Did you have any further conversation with Mr. Erhardt at that time? A. No.

Q. Showing you what appears to be an order on the form of Sears, Roebuck and Co., No. R12736, addressed to Karmel Korn Commissary, and I will

Testimony of Ralph Parker Ashby.)
ask you if that is the order which you gave to Mr. Erhardt at that time?

Mr. Rolston: To which I am going to object. Any questions regarding the documents addressed to Karmelkorn [20] Kommissary have no bearing on the relationship in this matter.

The Court: May I look at it? Objection overruled.

Mr. Wheeler: I ask that that be marked Defendant's Exhibit C.

The Court: It may be received.

The Clerk: So marked.

Q. By Mr. Wheeler: This order was prepared by you, and is signed by you? A. It was.

Q. And I call your attention to the date of the order, 11/29/43. The order was made out on the date that it bears? A. That is right.

Q. With reference to the Pan O' Butter Fudge, Mr. Ashby, did you have any conversations with Mr. Bower after Mr. Erhardt left your place of business? A. That same day?

Q. At any time? A. Yes, later.

Q. Do you recall the date of that conversation?

A. To the best of my recollection the date was December 2nd.

Q. How did the conversation occur, in person, or by telephone? [21] A. By telephone.

Q. Will you relate the conversation that you had with Mr. Bower at that time?

A. I do not recall whether Mr. Bower called me, or I called him. I do know the conversation was

Testimony of Ralph Parker Ashby.)

by phone. As our conversation started, Mr. Bower asked me if Mr. Erhardt had been over to see me. I said yes. Mr. Bower then asked me what arrangement we had come to. I repeated to Mr. Bower what Mr. Erhardt had said; that is, that he would give me 90 pounds of fudge to replace the 90 pounds that he saw in my office that was unsalable. I pointed out to Mr. Bower that I was still unsatisfied, but I did not want to be tough about the matter, and we would follow Mr. Erhardt's suggestion that we open the cases, and let the fudge dry out, and check the stores and find out just how much fudge was in an unsalable condition. I then told Mr. Bower that we would let him know the amount that was unsalable, and he said that was fine; and just a few other words relating to business in general, and we hung up.

Q. Did you call the various stores to which this candy had been delivered, for the purpose of advising them to take the covers off the fudge?

A. I called some stores, and I had my secretary call some of the others.

Q. When was the next conversation that you had with Mr. [22] Bower, that you recall, with reference to Pan O' Butter Fudge?

A. I don't recall the exact date. If I may explain, your Honor.

The Court: Yes.

A. Mr. Bower and I were having business dealings; I would see him once or twice, occasionally three times a week, all the time this fudge deal

(Testimony of Ralph Parker Ashby.)
was going on. Therefore, I can't be specific about some of the dates.

Q. You are doing pretty well.

A. The next time I specifically recall—there again, I cannot give you the exact date, but I do know it was in the week previous to Christmas.

Q. By Mr. Wheeler: Where did this conversation occur?

A. It occurred in Mr. Bower's place of business.

Q. What was said with reference to Pan O' Butter Fudge at that time?

A. Very little was said other than the fact that Mr. Bower asked me how the fudge was going. I said we were still having trouble, but we were selling some part of it.

Q. Did you have any further conversation with Mr. Bower prior to Christmas?

A. Only as I just mentioned to his Honor; there might have been some conversations in there, but I couldn't recall [23] any exact date.

Q. When was the next conversation that you had with Mr. Bower?

A. The next conversation covering the fudge was on January 4, 1944.

Q. Where did that conversation occur?

A. That occurred in Mr. Bower's office.

Q. What was the occasion for your visit at that time?

A. I took down a 9-pound sample of fudge to give Mr. Bower visible evidence that the fudge was not coming through, or, rather, had not come

Testimony of Ralph Parker Ashby.)
through at that time, as specified, and I wanted something done about it.

Q. What was the condition of the 9-pound slab of candy that you took to Mr. Bower at that time?

A. This particular slab was very hard.

Q. Did it have any other characteristic that you observed? A. It was discolored.

Q. When you say discolored, describe the discoloration.

A. The normal fudge is a rich chocolate color. This particular piece was very light, or mud color, or tan.

Q. When you say it was very hard, what test did you make with reference to its hardness?

A. I dropped the fudge on the concrete floor, and it didn't break. [24]

The Court: That was hard. Did you have one of these hammers they have in the candy shop?

A. They took all of those for the WPB.

The Court: You can see I am not a candy buyer or candy eater. I thought they still had those hammers.

A. Not for a number of years.

Q. By Mr. Wheeler: Did you have any conversation with reference to this fudge at that time?

A. I pointed out the condition of the fudge, and Mr. Bower agreed with me that it was pretty bad, and he would get hold——

Mr. Rolston: I move to strike out any statement as to any grievance.

The Court: Just what was said.

(Testimony of Ralph Parker Ashby.)

A. He said, "I will get hold of Bob Mitchell, the representative of Karmelkorn Kommissary."

Q. So that the record is clear, Mr. Ashby, your statement with reference to Mr. Bower saying that he agreed that it was pretty bad, as I undertsand the record, that has been stricken. Did Mr. Bower make any comment as to the character or the condition of the candy?

A. Yes, he said, "It looks very bad."

Q. Did you have any further conversation with Mr. Bower? A. Yes. Mr. Bower—— [25]

Mr. Rolston: When?

Q. By Mr. Wheeler: When was the next conversation?

A. Right the same day. A part of this.

Q. This was part of the same conversation?

A. Yes. Mr. Bower talked to someone on the phone, which I gathered was Mr. Mitchell from hearing my end of the conversation, and an appointment was made for representatives of this Karmelkorn Kommissary concern and Mr. Bower to see me, either the 6th or 7th of January, to actually inspect the fudge again. [26]

Q. Did Mr. Mitchell or Mr. Bower visit you and inspect the fudge on January 6th or 7th?

A. They did not.

Q. Did you have any conversation with Mr. Bower on January 6th or 7th?

A. I called his office on January 6th, but I was not able to get him. On January 7th I talked with him. He said that he had not, or rather Bob

Testimony of Ralph Parker Ashby.)

Mitchell had not as yet shown up, so he could not come over.

Q. Did you have any further conversation with Mr. Bower concerning the Pan O' Butter Fudge?

A. The next conversation with Mr. Bower concerning the fudge was some time in the week following January 12th. I believe it was the 16th or thereabouts.

Q. Did Mr. Mitchell visit you at your place of business?

A. They did,—or rather he did.

Q. Was there anyone else?

A. He was accompanied by Mr. Erhardt.

Q. Did you show Mr. Mitchell and Mr. Erhardt the fudge, or any of the fudge, at the time of their visit? A. I did.

Q. Do you recall the date of their visit?

A. January 12th.

Q. Where did you show them any part of the fudge?

A. I showed it in the Boyle store stockroom.

Q. Tell what happened there.

A. Mr. Erhardt and Mr. Mitchell came to my office first, and then we went over to the stock room, and at that time we had some of the fudge open and lying out, as Mr. Erhardt had previously suggested that we do. When they looked at it they were naturally very much amazed at the condition of the fudge.

The Court: No.

Testimony of Ralph Parker Ashby.)

A. When they looked at it, they made some specific comments.

The Court: That is better.

Q. By Mr. Wheeler: What did they say, as nearly as you can recall?

A. There again I am just repeating what I heard one or the other of the gentlemen state: If they hadn't seen it with their own eyes they would not believe it was possible. One or the other stated: Generally speaking, I would argue with the buyer. This time the buyer is absolutely right.

Q. What was the condition of the fudge at that time?

A. At this time the condition of the fudge was very moldy. It was, in fact, virtually running out of the cases. That is, it had become so soft it was virtually running out of the cases, and very moldy around the nuts.

Q. How many cases did they examine at that time? [28]

A. I don't recall the exact amount. It was somewhere in the neighborhood of eight or ten.

Q. Eight or ten cases? A. That is right.

Q. There were a number of cases in the storeroom at that time? A. Yes.

Q. They did not examine all of the cases?

A. No, they didn't.

Q. Did you have any further conversation with Mr. Erhardt and Mr. Mitchell at that time?

A. I did.

Q. What was the conversation?

Testimony of Ralph Parker Ashby.)

A. I do not recall the exact words.

Mr. Rolston: May it be understood I am objecting to all conversations between this witness and the representatives of Karmelkorn, Erhardt and Mitchell, in which we were not present.

The Court: Overruled. You may answer.

A. I stated to Mr. Erhardt and Mr. Mitchell, as I was addressing both of them as they stood in front of me, that I was not concerned about what their trouble would be with Mr. Bower or the Karmelkorn; that my beef was with Mr. Bower. All I wanted was to find out what they were going to do; to let me give them the quantities that were unsalable, so we could pay [29] the bill and wind the matter up.

Q. By Mr. Wheeler: Did you have any further conversation with them at that time?

A. No. If I may qualify that, the conversation just consisted of the usual goodbye, and they said they would get in touch with Mr. Bower.

Q. Did you have any conversation, after their visit, with Mr. Mr. Bower? A. I did.

Q. When was that conversation?

A. I don't recall the exact date of it. There were three days in a row we had conversations. My memory of the date is that they were the 16th, 17th and 18th of January.

Q. As to the first of the conversations that you had, was it by telephone, or in person?

A. Telephone.

Q. What was said during that conversation?

Testimony of Ralph Parker Ashby.)

A. I again asked Mr. Bower what he was going to do about the fudge. He said, so far as he was concerned, he was not going to do anything; that we had not notified them in time and, anyway, Karmelkorn was part of Sears, Roebuck and Company, and why didn't we get it straightened out amongst ourselves; that he was not concerned.

Q. Did you have any further conversation with him? A. On the 17th. [30]

Q. Was that in person, or by telephone?

A. Telephone.

Q. What was said during the conversation?

A. I asked Mr. Bower again if he was going to come over, and let us sit down and get this matter straightened out. He said he was too busy to come over.

Q. Did you have any further conversation with him at that time?

A. I called him again the next day and asked him if he was going to come over, and let us get it straightened out; that I wanted to get it off my mind because we were getting toward inventory time, and I wanted it cleaned up; he still said he was too busy to come over.

Q. Did you have any further conversation with him?

A. I had no further conversation with him.

(Short recess.)

Mr. Wheeler: If your Honor please, I don't like to interrupt the testimony of Mr. Ashby, but there is a young lady here who is a division man-

ager in one of the stores. She has to go to Palm Springs for her employment, and I would like to put her on.

The Court: All right. [31]

EDNA ANDERSEN,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Please state your anme.

The Witness: Edna Andersen.

Direct Examination

By Mr. Wheeler:

Q. Is it Miss Andersen? A. Yes.

Q. You were employed in the candy department of the Hollywood store, were you not?

A. Yes, I was.

Q. During what period of time were you employed in the candy division of the Hollywood store?

A. In the Hollywood store, since October, 1942.

Q. What was your position in the candy department? A. Division manager.

Q. Had you been previously employed in the candy department of Sears, Roebuck and Company? A. Yes, Sears' Pico.

Q. How long had you been employed in that department?

A. Almost two and a half years.

Q. Prior to 1942? A. Yes.

(Testimony of Edna Andersen.)

Q. You have recently terminated your employment with [32] Sears, Roebuck and Company?

A. Yes, on December 23rd.

Q. 1944? A. Yes.

Q. You are presently employed in Palm Springs?

A. No, my work doesn't start until February 15th.

Q. But you are living in Palm Springs at the present time? A. Yes.

Q. Calling your attention to Pan O' Butter Fudge, Miss Andersen, do you recall that fudge?

A. Yes, sir, I do.

Q. I show you a retail requisition on Sears, Roebuck and Company form No. 130343, and I will ask you what that requisition is.

A. This is the original requisition of the original amount of fudge received by us, checked in by my stock man, Mr. Hoffman.

Q. It was checked in on the date it bears?

A. November 19, 1943.

Q. And the amount as shown on that, as being checked in? A. 2,520.

Q. That amount was checked in by the stock man, under your supervision, is that correct? [33]

A. Yes.

Mr. Rolston: I am objecting to what anyone else did.

The Court: She was department head. She can testify as to that.

(Testimony of Edna Andersen.)

Mr. Wheeler: At this time I offer in evidence this retail requisition.

Mr. Rolston: I am going to object to its introduction into evidence. I have no objection to its being marked for identification, but it is no part of the evidence in this case, and is not binding upon us. Apparently all it is used for is to refresh the witness' recollection.

Mr. Wheeler: Oh, no.

The Court: For the present it may be received for identification only. I want it tied up a little more closely. I can't see the materiality, unless she is going to testify she received it, and testify to its condition. We will assume that Sears, being a store having agencies or branches, that they retailed that, or distributed that to their various retail branches for resale to the public.

Mr. Wheeler: That is correct. I was going to show by this witness the examination of the fudge that was made, the condition of the fudge, and so on.

The Court: Very well. After that you can do it.

The Clerk: Exhibit D for identification.

Q. By Mr. Wheeler: Miss Andersen, referring to this [34] Pan O' Butter Fudge, do you recall receiving it into the Hollywood store?

A. Yes, I do.

Q. What occurred at the time that it was received by you?

A. How do you mean,—checking it in and stocking it?

(Testimony of Edna Andersen.)

Q. Yes.

A. When receive merchandise on the dock I am notified; also my stock man is notified. He checks on the dock the quantity of boxes; then it is taken up to the receiving or marking room, and they check the amount of weight, and finish checking what the order is; then it is picked up by one of my regular stock men, or Mr. Hoffman, and put away in my stock room and locked up.

Q. Where is the stock room?

A. On the third floor.

Q. In what part of the building is it located?

A. What do you mean?

Q. Does it have any connection with or from any part of the sales area?

A. No, it doesn't; just offices, the marking room and checking room.

Q. You stock room is separated from the offices?

A. Yes, it is. I have five stock rooms in a row, and each has an individual door and lock on them.

Q. The stock rooms are separated by solid walls, are they not?

A. My stock rooms aren't, but they are separated from the office of the building.

Q. Your candy stock room, and the other five stock rooms you have in that same area, aren't heated?

A. They are not; there is no heat whatsoever in them.

Q. What is the condition with reference to ventilation?

(Testimony of Edna Andersen.)

A. I have a large window in every store room that is open during the day, and closed in the evening.

Q. What was the temperature of the stock room?

A. In the wintertime a person couldn't stand in the stock room very long without a sweater on.

Q. With reference to the Pan O' Butter Fudge you received a large number of cases, and they were stocked in the stock room?

A. Yes, it was.

Q. When did you first open any of the packages for the purpose of examination and sale?

A. Whenever we receive any merchandise of that type we usually take it to the floor immediately, or as soon as we possibly can,—take it to the floor, and naturally we open it, and cut it to sell it, and also open it in the stock room to see what merchandise I did get in.

Q. How much did you take down, and how much would you [36] maintain as your floor stock?

A. I imagine around 100 pounds.

Q. On the selling floor? A. Yes.

Q. What did you observe with reference to this Pan O' Butter Fudge?

A. It was a very beautiful-looking fudge. This was very attractive when we first opened it.

Q. It had nuts on it?

A. Yes, it had pecans on it. It wasn't like a factory stock; it wasn't smooth on top, but more like it was hand-done.

(Testimony of Edna Andersen.)

Q. As you opened the boxes, how was it packed?

A. It was packed two slabs to a case, a case being about 16 to 17 inches long—almost a square case, and around three to four inches high.

Q. As you opened these cases for sale, what did you observe with reference to the fudge?

Mr. Rolston: I object to that as having already been asked and answered. She said it was beautiful and attractive.

The Court: You may answer.

A. Well, the answer would be the same answer, at first. After we had the fudge several days, the honey or syrup or molasses was running out on the floor, and made a mess. It [37] must have been——

Mr. Rolston: Just a moment——

Q. By Mr. Wheeler: It was very wet?

A. Yes.

Q. Did you observe anything else with reference to the fudge at that time?

A. Not at that time.

Q. Did you examine many of the boxes?

A. I had them in about 10 or 15 to the stack, and I examined a few of the top ones, on each stack.

Q. Was all of the fudge damp or moist and runny?

A. Yes, all of the cases were sticking together. That was about the first time I called Miss Pressy in Mr. Ashby's office.

Q. When did you call Miss Pressy?

(Testimony of Edna Andersen.)

A. Within the week we received the merchandise. I don't remember which day we received the merchandise, but it was within a week's time.

Q. Then did any change take place in the condition of the fudge as you observed it, on opening the boxes?

A. Yes, we were notified to open the boxes, and let in the air or let the air get to them to more or less dry this wetness it had, then I noticed when we took it to the floor, after being open, it would chip on the outside when we cut it. It was very dry. It had a chalky effect. [38]

Q. Later did it change color?

A. It got grayer.

Q. Did you observe any other change?

A. Not at that time.

Q. Did you observe any change at any later time?

A. Yes; we were notified again to check through our complete stock. That's when the stock man and myself went through every box, and each slab, and checked them. I noticed a large proportion of the cases were mouldy, and they had flies in them.

Q. Do you recall the date that you first began to notice that the fudge was becoming chalky and hard? A. No, I don't.

Q. Can you fix the date with reference to Christmas, whether it was prior to Christmas, or after Christmas?

A. No; I believe it was before Christmas. I no-

(Testimony of Edna Andersen.)
ticed it on the floor mostly, when it was being cut.

Q. I show you a retail requisition which is dated 1/22/44, No. 92845, and I will ask you what that requisition is?

A. This requisition is what we call a retail return. We have had returned 588 pounds to pool stock.

Q. Was the examination which you made of the fudge at the time that you discovered that some of it was mouldy—was that made at or about the time of that requisition? [39]

A. It was made before, and segregated from the other fudge.

Q. In other words, you made the examination and segregated the moldy portion? A. Yes.

Q. Was it the moldy portion which you returned? A. Yes.

Q. To pool stock under that requisition?

A. Yes, it was.

The Court: You had it weighed before you made your requisition?

A. No, it was marked on the outside,—each case, the weight.

The Court: You added it up? A. Yes.

Q. By Mr. Wheeler: The balance of the fudge that you had on hand you retained and sold?

A. Yes.

Q. During the period from the date of the receipt of the candy in the store, at what price was the candy sold?

(Testimony of Edna Andersen.)

A. When received in the store, did you say?

Q. Yes. A. 89c a pound.

Q. For what period of time was it sold at 89c a pound? [40]

A. I can't give you the exact date. I would say through Christmas. I really can't say exactly when.

Q. Showing you a mark-up/down form No. 142-886, dated January 11, 1944, I will ask you if you recognize that form?

A. Yes, this form will give you the date that I took the mark-down on this fudge from 89c to 69c. It was on January 11, 1944.

Q. Did you have any discussion with Mr. Ashby at the time that you made that mark-down?

A. Yes, before this period we had discussed it.

Mr. Rolston: I am going to object to everything after the word "Yes."

The Court: I think the sales price may be material, bearing on the question of damages.

Mr. Rolston: This is a conversation between this witness and Mr. Ashby.

The Court: If you don't want to show that they sold it for a less price.

Mr. Rolston: That evidence is already in. I did not make any objection to that.

The Court: She got authority. Leave it there. She had a right to reduce the price.

Mr. Wheeler: For the court's information, as a measure of damages, we have claimed the sales price of 89c, and we have also included as a meas-

(Testimony of Edna Andersen.)

ure of damages the mark-down [41] that was taken in January of 1944.

Q. I call your attention to the figures that appear on this mark-down form. I note the figures 1652. Will you explain that figure, Miss Andersen?

A. 1652 pounds was the amount we had to take a mark-down on. It was turned to gray and we feared——

Mr. Rolston: Just a moment—no objection.

A. It was turned to gray and rather than take a heavier mark-down later by keeping the stock we felt we could move it out faster at 69c than at 89c.

Q. By Mr. Wheeler: Did you observe anything else at the time that you marked it down with reference to the condition of the fudge?

A. As I said, I had segregated this several times. This 1652 was the part that was still good.

Q. What was the basis of the segregation that you made from time to time?

Mr. Rolston: To which I am going to object as assuming facts not in evidence.

Q. By Mr. Wheeler: What did you observe as to the condition of the fudge at the time you made the segregation?

A. I made two; whether there were more than two, I don't know. The first was, it was getting very sticky. The second segregation was made because of molding.

Q. The second segregation was made as of the date you [42] returned it to the pool stock?

(Testimony of Edna Andersen.)

A. Within a day or so. It takes about a day to get the papers written up, signed, and sent out.

Q. I show you a document which is entitled "Mailgram" dated 1/21/44, and bears the typewritten signature of Mr. Ashby, and I will ask you if you received such a mailgram from Mr. Ashby? A. Yes, I did.

Q. Had you any discussion with Mr. Ashby prior to the time that you received that mailgram?

A. I can't say for sure whether it was Mr. Ashby or his secretary, but I know I had called the office several times.

Q. That was reference to the segregation of the candy?

A. Yes, the condition of the candy, as to the pecans and the mold.

Q. When you received this mailgram did it bear any figures in writing in the blank space? I will read it: "We have received special dispensation from L. A. pool stock and District Auditing Department for you to return at once to L. A. pool stock blank lbs. of the above fudge subject to the following." In that blank were there figures written in the copy that you received?

A. Yes, sir.

Q. What figure was written? [43]

A. 588 pounds. I believe Mr. Ashby or his secretary called and asked what figure we had——

Mr. Rolston: We object to the voluntary statement of the witness. She has answered the question.

(Testimony of Edna Andersen.)

The Court: That is not a voluntary statement. She was going to explain who put it in. It was a blank. You can object to my question if you want to. There is a blank here; in the typewritten memorandum there is a blank which indicates pounds. Was the poundage put in there?

A. Yes.

Q. Who put it in?

A. Mr. Ashby or his secretary, at the district office.

Q. You gave them the information?

A. Yes.

Q. You told them what you had segregated?

A. Yes.

Q. That was what? A. 588.

Mr. Wheeler: I have no further questions.

Cross-Examination

By Mr. Rolston:

Q. Miss Andersen, I believe you stated regarding the stock room, that is up on the third floor, and that it does not have solid walls, is that correct?

A. Let me explain the stock room. The walls dividing [44] my separate stock rooms are wood, and the rest is wiring.

Q. Lattice wiring? A. Yes.

Q. This candy was in the lattice wall portion?

A. The lattice portion; it just divided a certain section of the stock room off. The rest is boarded.

Q. How often would that stock room be opened and closed during the course of the day?

(Testimony of Edna Andersen.)

A. Some times 6 to 20 times a day; as much as the merchandise comes, as many times as you would have to go in to the stock room.

Q. This was during the busy time?

A. Yes.

Q. In other words, to the best of your recollection, the stock room was probably opened and closed 20 times or more a day?

A. Yes, at that period of time. We would always have the windows open unless it was too cold. We opened the windows when the store was first opened up, around 10:30, to closing time between 5:30 and 6.

Q. Did the windows open out on the store in general?

A. No, my own stock man or myself would open the windows.

Q. They connected between the stock room and what other part of the store? [45]

A. It was an open street, outside the wall of the building.

The Court: In other words, your stock rooms are built along a wall? A. Yes.

Q. And the partition between is to separate it from the other? A. The stock rooms?

Q. The stock partitions? A. Yes.

Q. In that stock room you carry nothing but candy?

A. Nothing but candy, and dried fruit.

Q. Things that go under the name of candy in the candy department? A. Yes, sir.

(Testimony of Edna Andersen.)

Q. Are there any shelves, or did you put the boxes right on the floor?

A. We have shelves, and sections for the different sized boxes and cases.

Q. By Mr. Rolston: That stock room had no cooling device or refrigerating system, did it?

A. No.

Q. How high were the stacks of Pan O' Butter Fudge?

A. I would say no higher than 10 cases, about three and a half to four inches to the case. [46]

The Court: They are hermetically sealed; they are all in cartons sealed, the way you receive them?

A. Yes.

Q. When you took any out did you leave a box open, or did you take the contents of the box as a rule?

A. We would take the whole carton to the floor. We never would leave part of a carton.

Q. You never took part, and would leave the rest exposed to the air?

A. No; the only time we exposed them to the air was when we were given information to do so.

Q. By Mr. Rolston: When you exposed them to the air you exposed them in the stock room or store room?

A. In the stock room, where they were originally put.

Q. How long did the stock stay in the store room?

A. I have nothing to do with the store room.

(Testimony of Edna Andersen.)
The merchandise would come in on the dock, and it was immediately sent up on the elevator to my stock room.

Q. After they are on the floor, are you in charge of selling them? A. Yes.

Q. Would any stock ever be returned from the floor back to the stock room? A. No.

Q. It was never returned? [47]

A. No, we only took down what we actually needed during the day's sale, and the stock was sold out during the day.

Q. No stock was ever returned to the stock room during that time, to your knowledge?

A. No.

Q. By the Court: During the holiday season would the stock you had for sale be about the same, or did you have to bring more down?

A. There was no certain amount which we sold. We sold maybe 500 pounds during the day. If there was need for more the stock room would bring it down.

Q. Where would you stock it?

A. On the shelves below the cases.

Q. Then you would open the box as you would need it? A. Yes.

Q. Then you would transfer it from the slab to the cases on the floor?

A. Yes, we had cutting shelves, and the girls would cut it and put it on trays, and put it on the shelves to be sold.

Q. And the remainder remained in the box?

(Testimony of Edna Andersen.)

A. Yes.

Q. By Mr. Rolston: Did you have a lot of new girls during the Christmas season, Miss Andersen? A. Yes.

Q. Did you have any trouble with the girls regarding [48] their disposition of cutting and selling fudge?

A. You take anyone, they don't like to get their fingers sticky or messy, and a lot of the girls wouldn't like it, but they would.

Q. If they had something else to do they wouldn't do the fudge?

A. No, if they were asked to do it, they would do it.

Q. The new girls? A. Yes.

The Court: You must have been a good manager.

A. I don't know. I had some good girls.

Q. By Mr. Rolston: Would there be any change in the fudge between the time you brought it down from the stock room and the time it was sold?

A. The only change would be, if it was cut and left too long, or if someone would cut up too much of it, it would dry out, and that would be the only thing.

Q. By the Court: Did you ever open up and take down more than the day's supply of this fudge as a rule?

A. No.

Q. Did you notice any decay that occurred from the time you brought down the fudge, and put it in the case for sale?

(Testimony of Edna Andersen.)

A. No, we would leave it in the original carton until we got ready to cut it. The stock boy would bring it down from the stock room and put it on the shelves below the case, [49] which was about two feet off the floor. As the girls needed it they would take out a slab at a time and put it on the trays.

Q. Did you ever see any change after they put it on the trays during the day?

A. If it was a very warm day it would dry out slightly on the outside.

Q. It wasn't very warm that time of the year?

A. No.

Q. You have testified to seeing conditions which indicated decay and mold?

A. Nothing like that happened in the case.

Q. Those are things you observed when you opened up the cases upstairs?

A. In the stock room, yes.

Q. By Mr. Rolston: Those things would be observed between the time you opened it in the stock room, and the time it was eventually sold downstairs? A. Yes.

Q. The stores are all lighted, are they not?

A. The sales part of the store is.

Q. The temperature is approximately 72 degrees?

A. That I wouldn't know exactly, sir.

Q. Was that a comfortable temperature?

(Testimony of Edna Andersen.)

A. Yes. [50]

Q. I believe you testified that the fudge was still good up to 1652 pounds?

A. What I meant by good was it was in a saleable condition.

Q. It was still saleable? A. Yes.

Q. If you had had more girls in your department, would you, in your opinion, have sold more of the fudge? A. No, sir.

Mr. Wheeler: I object to that as speculative.

The Court: You haven't pleaded contributory negligence here.

Mr. Rolston: It is not our burden to prove contributory negligence; or anything of that nature; they have the burden here.

The Court: That calls for the conclusion of the witness, because it does not develop how much she sold, how fast she sold it, or how many employees there were. There is nothing upon which to base the assumption.

Mr. Rolston: No further questions.

Redirect Examination

By Mr. Wheeler:

Q. Miss Andersen, with reference to the door to the stock room in which the candy was kept, did that door open into the sales area? [51]

A. There was no sales area on the third floor at all.

Q. Did the door directly leading into the stock-

(Testimony of Edna Andersen.)

room in which the candy was stored lead out to the office area? A. No, sir.

Q. In other words, there were a number of stockrooms in a walled-off area?

A. All the stockrooms are in the one large square. They all open into a large square. There are no offices in that area; nothing other than stock.

Q. In answer to a question you stated that if you kept the fudge for too long a period after cutting it would dry out and become grayish. What period of time was involved in your answer of "too long?"

A. I would say four or five hours. As a rule, the fudge would not stay on the trays that long. At that time we were very busy. Most of the girls would not cut up too much at a time—five or ten trays at a time, and when it got down to about half, they would cut a certain amount again, and it was a complete turnover.

Q. If it were left four or five hours it would tend to harden and become off color?

A. What I meant by off color was when we opened it, and it stood, it would get a gray color.

Q. At the time you opened it, what was the color? [52]

A. They were very moist, and dark.

Q. Dark brown? A. Yes.

Mr. Wheeler: No further questions.

Q. By the Court: How many girls did you have under you at that time?

A. Around 40. Behind the counter at one time

(Testimony of Edna Andersen.)
I would say there would be 10 girls. A counter was not very long; only 35 or 40 feet long.

Q. Were there any variations, so far as the increase in the number, about the time involved here, to the number you would have before?

A. Yes, during the regular time, when we don't have any rush sales, or Christmas, we have around 20 girls. At Christmas time it increases to 40.

Q. At that time you had 40?

A. I would say 30 to 40.

Recross Examination

By Mr. Rolston:

Q. Were these 30 or 40 girls new, having slight experience?

A. The girls I have had over a period of two years.

Q. All of them? A. Yes.

Q. Including the extras? [53]

A. We had very few. They worked short hours; they did not do anything but selling. They came in, and we were very busy, and they did nothing but selling.

Q. At no time did any of the fudge you examined in the stockroom become as hard as a rock?

A. At the last it was quite hard on the outside, at least. When the inside was cut it was soft, and the nuts, when we had it on the selling floor, would chip when we would cut it on the outside.

Q. That was after Christmas?

(Testimony of Edna Andersen.)

A. I can't give you the exact date.

Q. Was that after the mark-down?

A. I can't say for sure as to that.

Q. What is your best recollection, was it close to the mark-down time? A. I can't say.

Q. You can't give us any idea, as to when you noticed this condition?

A. At any time we received a block of it we opened it, and we would set it out in the air, and in a period of time it would have the same effect.

Q. As I understood your testimony, toward the latter time this happened as soon as you brought it downstairs? A. Yes, more or less.

Q. That was toward the end of the run, so to speak? [54] A. Yes.

Q. At or about the time of the mark-down, within a week one way or the other?

A. About that time.

Mr. Rolston: That is all.

Mr. Wheeler: No further questions.

(Whereupon an adjournment was taken until 1:30 p.m. of this same day, Tuesday, January 9, 1945.) [55]

Afternoon Session—1:30 O'clock

RALPH PARKER ASHBY,

recalled as a witness on behalf of the defendant, having previously been duly sworn, testified as follows:

Further Direct Examination

By Mr. Wheeler:

Q. At the time of the taking of Miss Andersen's testimony I neglected inadvertently, your Honor, to introduce the four exhibits to which reference was made.

Mr. Rolston: I have no objection to their being marked for identification, but I do object to their being introduced in evidence.

Mr. Wheeler: The retail requisition is dated 11/15/43.

Mr. Rolston: That is Exhibit D for identification?

Mr. Wheeler: Yes, Exhibit D for identification.

The Clerk: That is retail requisition No. 130343.

Mr. Wheeler: That is D for identification. Then the next one identified was retail requisition No. 92845, dated 1/22/44.

The Clerk: E for identification.

Mr. Wheeler: Then the mark-down form No. 142886, dated 1/11/44 would be——

The Clerk: F for identification. [56]

Mr. Wheeler: And the mailgram dated 1/21/44 would be G for identification.

Q. By Mr. Wheeler: Mr. Ashby, did you have

(Testimony of Ralph Parker Ashby.)
any further communication with Mr. Bower concerning the Pan O' Butter Fudge?

A. On January 20 or 21 I wrote Mr. Bower a letter outlining the entire story of the fudge in detail.

Mr. Rolston: Just a minute. I object to any statement of the witness as to what was in the letter. The letter speaks for itself; it is the best evidence.

The Court: There is no objection to his stating the subject he discussed in the letter.

Mr. Rolston: All right.

A. I sent it to him by registered mail.

Q. By Mr. Wheeler: I show you a copy of a letter dated January 20, 1944, addressed to Bower-Giebel Wholesale Company, attention Mr. Earl Bower. I will ask you if that is a copy of the letter that you received.

A. That appears to be a copy of the letter.

Mr. Rolston: May I see the letter, Mr. Wheeler?

Q. By Mr. Wheeler: I will ask you to examine a letter of the same date, which bears your signature, and ask you if that is the letter which you sent.

A. This is the original, without the pencil notations.

Q. In other words, there appear to be pencil notations along the side, and some interpolations, that were not placed there by yourself, or were not on the letter at the time you sent it?

A. That's right.

(Testimony of Ralph Parker Ashby.)

Mr. Wheeler: At this time I offer in evidence this letter as Defendant's Exhibit H.

The Court: It may be received.

The Clerk: The letter of January 20, 1944, is marked Defendant's Exhibit H.

Q. By Mr. Wheeler: Referring to the mail-gram which has been marked for identification as Defendant's Exhibit G, I will ask you, Mr. Ashby, if you sent such letters to the various stores in the Los Angeles district? A. I did.

Q. Mr. Ashby, prior to the time that you came to Sears, Roebuck and Company did you have experience in the candy business? A. I did.

Q. What was that experience?

A. A number of years immediately prior to coming with Sears I was the seller of candy.

Q. For what company?

A. The E. A. Hoffman Candy Company.

The Court: Is that a local concern?

A. Yes, sir. [58]

Q. By Mr. Wheeler: How many years were you so employed? A. With E. A. Hoffman?

Q. Yes.

A. About two years, approximately.

Q. Did you have any other experience in the candy business?

A. Yes, previously to that I was seller of candy for the Triangle Candy Company, Los Angeles.

Q. For what period of time?

A. That was also about two years.

Q. Did you have any further experience?

(Testimony of Ralph Parker Ashby.)

A. Yes, previous to that I was candy manager for the H. S. Kress Company for about five years.

Q. Prior to that did you have any experience in the candy business?

A. No. I beg your pardon; it was probably longer than five years; from 1928 to about 1934 or 1935; somewhere in there.

Q. During the period of your experience with candy, have you had experience with fudge?

A. Yes.

Q. Over what period of time?

A. During all this time. When I was with H. S. Kress Company I was merchandise manager in the candy department, [59] and one of the principal items in that department was fudge. When I was a salesman I sold a lot of fudge myself.

Q. Are you familiar with the qualities relating to fudge as a candy? A. I believe I am.

Q. Mr. Ashby, from the examination that you made of the sample of candy that you examined in Mr. Bower's office did you form an opinion as to the type or quality of fudge that it was?

A. I did.

Mr. Rolston: Just a minute. I am going to object to that. I don't think there is any issue on that point, your Honor. I don't think this is the proper witness for it.

The Court: He has shown himself experienced in the field, and he may say whether it was in an edible condition or a saleable condition, and things like that. We have already had it described. Some

(Testimony of Ralph Parker Ashby.)

of it was sticky, runny, some had mold. I think that can be answered yes or no, and then get down to the particular thing. Read the question, Mr. Dewing.

(Question and answer read by the reporter.)

The Court: The answer will stand.

Q. By Mr. Wheeler: What opinion did you form as to the grade or quality of the fudge? [60]

Mr. Rolston: To which I will object upon the ground that there is no issue as to the grade or quality of the fudge in this particular case, your Honor.

Mr. Wheeler: I will withdraw the question, your Honor.

Q. From your experience or based upon your experience, did you form an opinion as to the length of time that such fudge could be held?

Mr. Rolston: I object to that as outside the issues of the case.

The Court: I think you are anticipating.

Mr. Wheeler: I am, your Honor.

The Court: I don't think you should. It is quite evident from the sales order that the shipments were to cover a period of weeks, and I don't think it is material at the present time to determine whether they held it too long. It may be, later on.

Mr. Wheeler: I will withdraw the question.

The Court: I will sustain the objection at the present time.

Q. By Mr. Wheeler: Did you make any effort

(Testimony of Ralph Parker Ashby.)
to dispose of the candy that was returned to the pool stock warehouse, Mr. Ashby.

A. I did.

Q. Could you dispose of it? [61]

A. I could not.

Mr. Rolston: To which I am going to object on the ground that it calls for a conclusion.

The Court: I think he ought to state what he tried to do, rather than his conclusion.

Q. By Mr. Wheeler: What did you do?

A. What do you mean? What my efforts were along that line?

Q. Yes, what you did.

A. I called a man in town here I knew dealt in merchandise that was not always top quality, and talked with him on the phone, to see if I could get him to dispose of some of it.

Q. By Mr. Wheeler: What was the man's name? A. His name was Clark.

Q. Do you know his full name?

A. I do not.

Q. He is present in the courtroom, is he?

A. He is.

Q. I am advised that his name is H. P., for the purpose of the record. Was he willing to take the candy? A. He was not.

Q. Did you make any further effort to dispose of the candy? A. I did not. [62]

Q. Did you have any discussion with reference to recooking the candy?

(Testimony of Ralph Parker Ashby.)

Mr. Rolston: With whom.

Q. By Mr. Wheeler: Any discussion.

A. I talked to——

Mr. Rolston: Just answer yes or no, Mr. Ashby, please.

The Court: Go ahead and say yes or no.

A. Yes.

Q. By Mr. Wheeler: With whom did you have that conversation?

A. I talked with a member of the firm of the Triangle Candy Company.

Q. Was that company willing to take the Pan O' Butter Fudge that you had in the warehouse, for the purpose of recooking it?

Mr. Rolston: I am going to object to that as calling for the conclusion of the witness, as to whether this other company was willing to do anything.

Q. By Mr. Wheeler: State the conversation that you had.

A. I asked this member of the firm of Triangle Candy Company if they would be willing to recook the fudge, to make it into a saleable commodity. He said no, that they did not do that, and in no case would they recook somebody else's [63] fudge.

Q. Did you make any further effort to dispose of it? A. I did not.

Mr. Wheeler: I have no further questions. Cross-examine.

(Testimony of Ralph Parker Ashby.)

Cross Examination

By Mr. Rolston:

Q. Regarding this discussion with the Triangle, when did that occur?

A. The discussion with who?

Q. With the Triangle Candy Company.

A. Some time—I don't have the exact date, but some time between the last arrival of the fudge and January 20th. That would be some time between December 6th and January 20th.

Q. By the Court: Was that before you wrote this letter to Mr. Bower?

A. It was.

Q. Who did you talk to, Mr. Kennepohl?

A. That's right.

Q. I happen to know that, because they had a case in this court; that is, a different kind of case; a pure food case.

Mr. Rolston: That was probably the reason they refused to cook anybody else's. When did you talk to Mr. Clark concerning disposing of it to him? [64]

A. I don't recall the date. Some time in this same period.

Q. Prior to January 20th?

A. Prior to January 20th.

Q. It couldn't have been several months later, could it? A. It couldn't have been.

Q. How many conversations with Mr. Clark did you have?

A. I believe I only had one conversation with him directly.

(Testimony of Ralph Parker Ashby.)

Q. By the Court: Did he come out to the plant to look at the candy?

A. No, sir, I called Mr. Clark's home, and a lady who said she was Mrs. Clark said he was not at home; but would be home about——

Q. Not that. After you talked to him, did he come out and look at it?

A. No, he did not go into the matter at all.

Q. By Mr. Rolston: To your knowledge?

A. He did't look at our fudge.

Q. Where was the fudge stored on January 20th?

Mr. Wheeler: I object to that as not being the best evidence.

A. I don't know. The records would show that.

The Court: What?

A. I don't know where it was stored on that date. The [65] record that my attorney has would show that.

Q. Did you accummulate all the fudge from all these stores together?

A. Yes, but I personally did not get into that end of the business.

Q. But you had it together in one place?

A. That's right.

Q. By Mr. Rolston: Do you recall when it was gathered together in one place?

A. I don't recall the date. The records will show that.

Q. Do you have records? Let us find out.

Mr. Wheeler: Can you fix the date?

(Testimony of Ralph Parker Ashby.)

A. It would be prior to January 31st; some time between January 18th or 19th and January 31st.

Mr. Wheeler: For the purpose of the record, if it will expedite it, the records which will be subsequently introduced indicate that it was collected in the pool stock warehouse on January 21st and 22nd, with one shipment being received January 31st.

Q. By Mr. Rolston: Mr. Ashby, do you know how many pounds of fudge you had left on hand for disposal prior to the accumulation in the pool stock warehouse?

A. I do not know the exact amount. I know approximately. [66]

Q. Did you tell Mr. Clark approximately how many pounds you had?

A. It was approximately 10,000.

Q. Did you tell Mr. Clark that in your conversation with him?

A. I don't believe I said the amount; no; I don't recall saying the amount.

Q. Did you discuss any price with him?

A. Yes, there was discussed a price.

Q. At what price did you offer the merchandise to Mr. Clark?

A. I believe the price—he asked me the price that I wanted, and if I remember correctly, it was approximately 20c a pound, or in the neighborhood of that.

Q. Mr. Ashby, going back to the first conver-

(Testimony of Ralph Parker Ashby.)
sation you ever had concerning this fudge, that was on or about October 20th or 21st?

A. Do you mean the original conversation?

Q. That's right. Going back to that, isn't it a fact that when that fudge was cut, some of it stuck to the knife? A. A very tiny bit.

Q. Isn't it a fact you told them to wet the knife, and you would eliminate that sticking quality of the fudge?

A. I don't recall saying that. [67]

Q. Do you recall somebody going back and wetting the knife?

A. I don't recall it, but it possibly could have happened.

Q. But you do recall that some of the fudge stuck to the knife? A. A very small amount.

Q. During the conversation, you testified you had some further discussion regarding the change of the features by adding pecans.

A. I merely told Mr. Erhart—there were three gentlemen standing there—that I would like to have more nuts added, both on top and in the mixture.

Q. In the mixture? Did you ask what type of nuts would be added, half pecans or chopped?

A. I wanted larger sized pecans on top.

Q. Any particular size?

A. Just larger than what they had.

Q. Was there any particular size of nuts that you wanted scattered throughout the fudge?

(Testimony of Ralph Parker Ashby.)

A. No, the nuts weren't to be scattered whole; they were to be ground up.

Q. Did you ever see any sample of the fudge with the pecans in it ground up? [68]

A. This sample which we were cutting had ground-up pecans in it. I was merely asking for a larger proportion of the pecans.

Q. There were pecans all the way through this fudge?

A. Yes, there were, but not enough, in my opinion.

Q. During the conversation is it not a fact that Mr. Bower told you that he had no experience or knowledge concerning bulk fudge?

A. That is true. I would like to qualify that by saying bulk candy of which this was a class of bulk candy.

Q. As a matter of fact, he told you he had no experience with the type of bulk candy?

A. That's right.

Q. You told him you had lots of experience, is that right? A. That's right.

Q. In purchasing the fudge you were relying upon your own experience with fudge and fudge products and bulk candies, were you not?

A. To some extent.

Q. You were not relying upon any custom or usage in the business, were you?

A. I was.

Q. Mr. Ashby, I am showing you a copy of your deposition, which was taken two weeks ago,

(Testimony of Ralph Parker Ashby.)

November 29th, and call [69] your attention to page 35, and ask you to read from line 6, through line 7. Read it to yourself. Mr. Ashby, at the time of your deposition, November 29th, isn't it a fact that you testified as follows to the following question:

"Q. Did you rely upon any custom or usage in the business? A. No."

Was that your testimony at that time?

A. That was my testimony at that time.

Q. Mr. Ashby, did anybody connected with Bower-Giebel Wholesale Company at any time tell you that this fudge was merchantable or usable or saleable—use any of those words?

A. Not directly, no.

Q. Did you, at any time, Mr. Ashby, examine any other sample of the merchandise prior to the receipt of your first shipment?

A. I don't recall any, no.

The Court: Except the one sample that he showed you?

A. The sample I brought from him, yes.

Q. By Mr. Rolston: Is it not a fact that within the first two or three days of November Mr. Bower called you over to his office to show you another sample that had just arrived?

A. I don't recall that particular instance.

Q. Possibly I can refresh your memory. You save [70] stamps, do you not, Mr. Ashby?

A. I do not.

(Testimony of Ralph Parker Ashby.)

Q. You are not a philatelist? You know what a philatelist is? A. Yes.

Q. Do you save stamps of any other person?

A. Well, I may have taken some stamps off of the carton around there, that was something unusual, yes.

Q. Wasn't that a carton of pecan fudge, that was just airmailed special delivery from Chicago?

A. I don't recall this particular instance you are bringing up at all, although it could have happened.

Q. I am trying to refresh your memory, Mr. Ashby, by calling your mind to stamps. During the conversation in the first part of November, isn't it a fact that Mr. Bower pointed out, in a new sample, that this was a sample of the type of merchandise being shipped, and it had more pecans in it than the other sample? Does that help you refresh your memory as to such conversation? A. He could have, yes.

Q. That is the incident in which you cut some stamps off of the carton; some $15.00 worth of postage stamps?

A. I may have done so.

Q. Did you take any part of that sample and put it in your little sample cabinet? [71]

A. I did not.

Q. Did you take a sample with you at that time? A. No.

Q. Are you sure of that?

A. Reasonably sure, yes.

(Testimony of Ralph Parker Ashby.)

Q. Was that sample cut?

A. I don't recall.

Q. Do you recall the condition of that sample, whether it was wet, or any wetter than the original sample?

A. That particular sample, as far as my memory serves me, was satisfactory.

Q. You definitely recall the incident at that time, do you not?

A. May I explain something, Judge?

The Court: Yes.

A. I was calling on Mr. Bower from one to three times a week during this time, and there must have been, roughly, 18 or 20 or 25 calls. This incident may have happened. I don't specifically recall it.

Q. You are not supposed to be infallible.

A. There were so many calls at his office, and so many conversations I don't recall outside of certain instances where there are some records to back up the things that happened. I don't recall every conversation we had.

Q. By Mr. Rolston: If I brought the box with the [72] stamps which were used into court, would not that refresh your recollection better?

A. I will stipulate that I took them.

The Court: He has stated this may have taken place.

Mr. Rolston: I am just trying to use that to refresh his recollection as to the appearance of the sample he saw on that day.

(Testimony of Ralph Parker Ashby.)

The Court: He has no recollection of the sample. He says the incident may have taken place.

Q. By Mr. Rolston: Do you have now any further recollection of the sample shown to you on that day?

A. It may have taken place. I recall something along that line.

Q. Do you recall what the sample looked like that you saw upon that occasion?

A. I would recall that it looked satisfactory.

Q. Do you recall whether or not it looked any wetter than the original sample?

A. No, I don't recall whether it was any wetter. The original sample was not wet.

Q. Do you recall whether or not there was any indentation, or accumulation of moisture around the pecans that were on top?

A. On the second sample?

Q. On the second sample. [73]

A. I don't recall that. To my knowledge there was none.

Q. You have testified to a conversation which you had on or about November 25th, and I believe you testified it may have been a day either way, is that correct? A. That is correct.

Q. You have also testified that upon that occasion you brought a sample to the store of the Bower-Giebel Wholesale Company?

A. That is correct.

Q. What was the nature and general appearance of that sample?

(Testimony of Ralph Parker Ashby.)

A. The nature of the sample,—it was in a small bag. The sample was very, very wet and moist; so much so, in carrying it down from my office to Bower-Giebel it ran together in the sack.

Q. In other words, at that time, by the time you were through handling it it looked like a ball, isn't that right?

A. Everybody in the office handled it, so by the time they got through, I would say it was.

Q. Where did that sample come from, Mr. Ashby, if you recall?

A. I don't recall exactly. My memory is that that came from the Boyle store shipment.

Q. Do you mean from the pool stockroom?

A. No, from the Boyle stockroom.

Q. Is that the East Olympic store?

A. The distribution had been made from the pool, and I merely got this sample from that particular portion of the shipment that was sent to the Boyle Street store.

Q. Do you recall what portion of the shipment went to the Boyle Street store?

A. Do you mean——

Q. My question is, do you recall?

A. No, I don't recall, other than it was some part of the first few shipments. The record will show that.

Q. Part of the first few shipments?

A. Yes.

Q. Would this paper sack, or sample which you

(Testimony of Ralph Parker Ashby.)
brought, which was in a paper sack, be described as a 9-pound slab? A. No.

Q. It was smaller than that?

A. I don't know how much was in there. I would say maybe a pound or two pounds; something like that.

Q. At that time you had not received over 5,000 pounds, had you?

Mr. Wheeler: I object to the question as being not the best evidence.

The Court: If he knows. You may answer.

A. I would say that I am not positive, because the warehouse [75] records will show all those exact shipping times, and when the individual stores got their shipments, and so forth.

The Court: All right. It doesn't matter.

Mr. Rolston: Rather than have the witness go through and read the deposition, will you stipulate in the deposition he testified he brought a 9-pound slab?

Mr. Wheeler: Yes.

Mr. Rolston: And that was the first shipment, and he qualified that by adding it could have been the first or second shipment?

Mr. Wheeler: He qualified it further, and said it might have been sent in the fourth shipment. To the extent of his knowledge, I will stipulate.

Q. By Mr. Rolston: In your direct testimony, Mr. Ashby, did you testify as to all of the conversation you had with Mr. Bower on November 25th?

(Testimony of Ralph Parker Ashby.)

A. I did not hear all of the question.

Q. Read it.

(Question read by the reporter.)

A. I did.

Q. Is it not a fact you further discussed the question as to whether or not Sears was going to pay for the merchandise?

A. My recollection is I verbally told Mr. Bower that our practice was, in a case of that kind, where the merchandise [76] was not satisfactory, or there was any doubt, to stop payment on it.

Q. Isn't it a fact that you told him at that time that you were going to stop payment on his account? A. It is.

Q. Or on his invoice? A. It is.

Q. You actually gave him that verbally, whether it was the practice of Sears or not, is that true?

A. Do you mean that I told Bower?

Q. Yes. A. I did.

Q. At that time did you ask him whether or not he could stop payment on his checks to Karmelkorn Kommissary? A. I did not.

Q. Was that discussed at that time?

A. I don't recall that was discussed at all.

Q. Do you recall the incident where Mr. Bower called his secretary over, in your presence, and dictated a letter to the bank, stopping payment on his checks to Karmelkorn Kommissary?

A. I don't recall the incident.

Q. Do you have any recollection at all of such a conversation at that time, during which Mr.

(Testimony of Ralph Parker Ashby.)

Bower said he was going to stop payment on his checks? [77]

A. I don't recall the conversation, but in the course of the discussion about the fudge it could possibly have come up.

Q. Do you have any recollection of that?

A. Nothing other than what I have just stated.

Q. I call your attention to your deposition, page 14, line 18, and ask you to read the question and answer appearing there. A. Yes.

Q. Did you testify as a matter of fact, at the time your deposition was taken—I had better have you go back and read the previous few sentences; beginning line 7, page 14. Is it not a face, Mr. Ashby, at the time of the taking of your deposition on December 29, 1944, at your attorney's office, the following questions and answers were made:

"Q. Did he discuss"—referring to Mr. Bower—"Did he discuss at that time whether or not they could stop payment on any checks?

"A. Whether he could?

"Q. Yes.

"A. He might have. I don't remember.

"Q. As a matter of fact, you asked him whether or not he had paid for it and he said, 'My gosh, you saw me give them a $7,000 check in advance, but there are some out that may be [78] stopped,' and he went out and dictated in your presence a stop-payment order?

"A. It is quite possible he did.

(Testimony of Ralph Parker Ashby.)

"Q. Would you say that he did do that in your presence?

"A. I don't recall it. There was considerable conversation about it, and I have a faint recollection that there was something about stopping his checks.

"Q. Do you have a faint recollection whether or not he called the girl over and dictated a stop-payment to the bank right then and there?

"A. Yes, I believe there was something like that.

"Q. He dictated the stop-payment on four checks? A. I suppose he did."

At the time of your deposition did you so testify?

A. There was some dictation——

The Court: Counsel stipulated.

Mr. Wheeler: Yes, that is what he said.

Q. By Mr. Rolston: Did you go on and make any other purchases at that time, Mr. Ashby, of any other merchandise other than fudge?

A. I believe there was. The purchase orders would show that. As I said before, we were in the process of buying goods on almost every visit.

The Court: You bought other things from him from year to year? [79]

A. From Mr. Bower?

Q. Yes.

A. Yes, I have been buying for, I believe, about 12 or 15 months.

Q. From him? A. Yes.

Q. For Sears? A. That's right.

Q. By Mr. Rolston: The conversation with Mr. Bower, which you have just related concerning the

(Testimony of Ralph Parker Ashby.)

sample of fudge in the paper sack, and the stop-payment discussion which occurred,—could that conversation have occurred as late as November 29th?

A. It could not.

Q. It could not have occurred as late as that?

A. It could not.

Q. If I show you a purchase order dated November 29th, would that refresh your recollection in that regard? What is your answer to the last question, please?

A. I want to see the purchase order before I answer that question.

Q. I show you two purchase orders bearing Nos. 12732 and 12733, both bearing date of order 11/29/43, shipping date 11/29/43 on one, and shipping date on the other 12/1/43.

A. This is my purchase order. [80]

Q. Does such purchase order refresh your recollection as to when that conversation regarding the sample occurred?

A. So far as my memory is concerned the conversation that you are referring to took place prior to November 29th.

Q. If I told you that November 29th was on Monday, would that change your answer in any way? A. No. It confirms my answer.

The Court: This is wasting time.

A. That is what definitely fixes it in my mind.

Q. By Mr. Rolston: Did you actually stop payment on your account to Bower-Giebel?

A. We did not stop payment.

(Testimony of Ralph Parker Ashby.)

Q. You did tell Mr. Bower you stopped payment? A. That's right.

Q. I believe you testified that your next conversation concerning the discussion of fudge, after the one you testified to, was on December 2nd, is that correct? A. That's right.

Q. Is that the same conversation that you placed at an earlier date in your deposition?

A. Yes; in the deposition I was somewhat unsure of the dates other than it was after this, and was December 2nd.

Q. Do I understand that is the same conversation you related at that time?

A. That's right. [81]

Q. That was a telephone conversation?

A. That is correct.

Q. During the conversation is it not a fact that Mr. Bower asked you whether or not you were releasing the hold on his accounts?

A. I don't recall whether he exactly said that or not.

Q. Or words to that effect?

A. He might have said something to that effect, yes.

Q. What was your answer to that question.

A. My answer was yes, because——

Q. Your answer was yes, you were releasing the stop-payment thereon? Was that your answer?

A. We never put it on so we couldn't release it.

Q. You told him it was put on?

(Testimony of Ralph Parker Ashby.)

A. All right, I told him, but that is still my answer.

Q. You had told him?

A. I had told him, but I had never bothered the accounts payable, which has to be done in writing to put a stop-payment on his account.

Q. Is my recollection correct, Mr. Ashby, that you did testify that in that conversation on November 25th, or thereabouts, you told him you were going to stop payment? A. That is correct.

Q. Did Mr. Bower, during that conversation, ask you whether or not it would be all right for him to release payment [82] on his stop orders?

A. I don't recall his asking that question.

Q. Or a similar question?

A. Or a similar question.

Q. Do you recall his talking at all about the checks being released?

A. I will have to explain that answer.

The Court: You can answer yes or no, and then explain it.

A. I don't recall the question, I mean, his asking me that, because I was not concerned about his end of the transaction, to the point that I remember exactly what he said about his end of it.

Q. By Mr. Rolston: Did you have a conversation with Mr. Bower the day after this telephone conversation, on or about December 3rd, during which a further discussion was had regarding his, Mr. Bower's, checks?

A. I don't recall any of the subsequent conver-

(Testimony of Ralph Parker Ashby.)

sations. As I say, I was down at Mr. Bower's place almost every day, and it possibly could have been discussed.

Q. Do you recall during a conversation, on or about December 3rd, when Mr. Bower saw you in the morning and said, "Seeing you reminds me" or words to that effect—"Seeing you reminds me of the fact that I have not notified the bank to cancel my stop-payments." Do you recall that, and do [83] you recall his calling over his secretary and telling her to write a letter to the bank withdrawing the stop-payment?

A. I don't recall that incident.

Q. Do you recall the dictation incident, on or about the 2nd or 3rd?

A. I don't recall that specific instance, no.

Q. Did you discuss the fudge on the morning of the 3rd?

A. As I said, we might have. I don't recall it.

Q. Did you have any discussion at all with Mr. Bower between December 2nd and the conversation you have testified to as being just prior to Christmas, in which fudge was discussed?

A. We had only a particular off-hand remark. It was not exactly a conversation, prior to Christmas, that I specifically recall.

Q. Do you recollect a conversation during which you told Mr. Bower that the fudge was selling all right, but the girls weren't handling it, and you were having a lot of trouble with new girls, and further, to the effect that it was messy handling?

(Testimony of Ralph Parker Ashby.)

A. I stated that some time during that period, but I want to qualify that remark, if I may.

The Court: Yes.

A. The reason I want to qualify it is because that is [84] just an excerpt from the conversation in general. The preamble of that remark was the fact that we could not do all this lying of fudge around, and so forth, that Mr. Erhart had suggested, because we had a lot of green girls who would not know what it was all about, and when they would see all this fudge lying around our stockrooms, open, it would give them the wrong idea of how Sears did business.

Q. By Mr. Rolston: When did you have that conversation with Mr. Bower?

A. I don't recall. It was in that period.

Q. You told Mr. Bower that on December 2, 1943, in the telephone conversation?

A. I don't think it was. I don't recall that over the telephone.

Q. Have you ever seen Mr. Bower, after the time he came up to you, prior to your telephone conversation with Mr. Bower on December 2nd, and before he came up to you in January?

A. I only saw Mr. Bower twice.

Q. Those two times that you have mentioned?

A. Yes.

Q. Did you ever tell Mr. Bower that you never wanted to hear the word "fudge" again; it was too messy? A. I certainly did.

(Testimony of Ralph Parker Ashby.)

Q. That was during this same period, wasn't it, between [85] December 2nd and Christmas?

A. It was.

Q. Did you ever tell Mr. Bower that during that time you almost lost your shirt over that fudge; that you over bought?

A. I could have said that.

Q. Do you have a recollection of ever having said it?

A. I can't recall specifically, because that is merely an excerpt from a continuing conversation over weeks.

The Court: You were wrangling continuously, is that the idea?

A. As I mentioned before, your Honor, I was seeing that gentleman two or three times a week, and there was possibly some crack or remark made each time. After all, we were doing a lot of business. I was down there quite often.

Q. By Mr. Rolston: In other words, Mr. Ashby, every time you saw Mr. Bower there was some discussion about fudge, wasn't there?

A. It might have been just merely how was the fudge; that was all.

Q. And the answer was: Pretty messy for handling it, but we are selling it?

A. We are selling it, as far as we are going along. That might have been one of the particular remarks, yes. [86]

Q. You recall telling him you almost lost your job over the fudge incident?

(Testimony of Ralph Parker Ashby.)

A. I might have said that.

Q. And that you over bought the item?

A. I did not say that.

Q. You never told Mr. Bower that you over bought the item? A. I did not say that.

Q. Did you have any conversation with Mr. Bower between Christmas time and New Years?

A. I don't recall any conversation with Mr. Bower between Christmas time and New Years.

Q. Were your stores open at that time?

A. They were open five days, I think, a week. We were closed on Saturdays, Mondays and Sundays. I know there were three days there they didn't work.

Q. Upon the occasion that you came in to Mr. Bower's place of business, in January, I think you testified January 4th? A. That is correct.

Q. You brought a slab sample at that time?

A. That was the time in my deposition I got the two visits mixed up. That was the time I brought in the 9-pound slab.

Q. That was the dry slab? [87]

A. I had two.

Q. Did you make a purchase of other commodities at that time?

A. I don't recall. The purchase orders will possibly show that.

Q. Did you tell Mr. Bower at that time that you were going to stop payment on his invoices?

A. I don't recall saying that at that time, no.

Q. Did you ever tell Mr. Bower, subsequent to

(Testimony of Ralph Parker Ashby.)
that first conversation in November, that you were going to stop payment on the invoices or on his account? Did you ever tell him at any time except that once?

A. I told him in this letter that I wrote him.

The Court: He means orally, did you tell him?

A. I don't recall writing him again after the first instance.

Q. By Mr. Rolston: Do you recall when you actually stopped payment on his invoices?

A. I stopped payment on his invoices — do you mean the exact date?

Q. Yes.

A. No, but I recall that I did. The accounts payable would possibly show that.

Q. I show you a letter in handwriting dated 1/12/44, addressed to Saxe, and apparently bearing the signature of [88] R. P. Ashby. Is that your signature? A. That is my signature.

Q. Is that your handwriting?

A. That is my handwriting.

Q. Is that the date upon which you stopped the invoices?

A. I would presume it is. That is not my handwriting on there. I told Mr. Saxe, verbally phoned to him, and he said I had better put it in writing. I wrote this out. We don't have a form for this sort of thing, so I just wrote it on that memo and sent it up with my secretary. I presume that is his handwriting.

(Testimony of Ralph Parker Ashby.)

Q. To the best of your recollection that was on or about January 12? A. That is right.

Q. It is true, isn't it, Mr. Ashby, that to your knowledge the fudge had been paid for, or a vast majority of the fudge had already been paid for?

A. I wouldn't know, to my knowledge, exactly what the status of Mr. Bower's account was at that particular moment; I mean, on January 12th.

Q. Did you ever check his account at a later time to see whether or not the fudge was paid for?

A. I looked into that only—I have never actually checked as to the fudge itself; I merely checked into how much money was running through on his account. In other words, [89] if I might qualify that, we don't pay by statements; we pay by invoices. Where there is a continuing relationship, such as with Mr. Bower, and money is being paid out, the bills are being paid all the time. There is no particular time when they are piled up and all paid.

Q. They are paid on invoices?

A. That's right.

Q. Do you have the original invoices for this fudge? A. Yes.

Q. If I recall your testimony, Mr. Ashby, at no time had you ever advised Mr. Bower that the fudge was moldy, is that true?

A. I have never advised him?

Q. Yes, of its moldiness.

A. That is not true.

Q. When was the first time you ever advised him that it was moldy?

(Testimony of Ralph Parker Ashby.)

A. On either November 24th, 25th or 26th. In other words, prior to the visit of Mr. Erhart, which was definitely fixed as November 29th, by an order which my attorney has.

Q. Isn't it a fact, Mr. Ashby, that your conversation with Mr. Bower was on the morning of the same day Mr. Erhart came up to see you?

A. Which conversation?

Q. The conversation you referred to, that is, the [90] conversation of November 24th, 25th or 26th.

A. It was on the morning of the day before Mr. Erhart came? No.

Q. The day that Erhart came.

A. It was previous. My original conversation with Mr. Bower was previous to the visit of Mr. Erhart.

Q. Did Mr. Erhart go there in the morning or afternoon?

A. I don't recall the exact time. I believe it was just about noon; noon, or very close to it.

Q. Did you see Mr. Bower on the same day?

A. I don't recall that I did at that time. It is quite possible.

Q. Did you have a conversation with Mr. Bower on January 10, 1944?

A. I don't recall that date as being January 10th particularly; it might have been.

Q. I say, did you have a conversation with him?

A. I guess I did. I don't recall the date. I don't recall any particular conversation on January 10th.

Q. The conversation you are referring to on

(Testimony of Ralph Parker Ashby.)

January 4th could not have occurred that late, could it? A. It could not.

Q. I will show you two purchase orders, Nos. 4257 and 4258, both orders showing the date of January 10, 1944, and [91] ask you if that is your signature? A. That's right.

Q. Did you have any discussion with Mr. Bower on that day?

A. I might have. I don't recall any discussion of the fudge on that particular date.

Q. You don't recall a conversation regarding fudge at that time?

A. No, other than my previous testimony as to the fact that on each of my various visits two or three times a week there may have been some more or less discussion of this item.

Q. Mr. Erhart came to see you when in January?

A. The second visit was January 12th.

Q. You don't mean there were two visits in January? A. What?

Q. You don't mean Mr. Erhart visited you twice in January? A. No. His second visit to me.

Q. Did you see Mr. Erhart on that day?

A. I don't recall seeing him. May I go back?

Q. Surely.

A. On January 4th, when I called this to Mr. Bower's attention he said he would have to get hold of a gentleman by the name of Bob Mitchell, who was in on the original purchase. [92] I gathered from my listening on my end of the conversation—

(Testimony of Ralph Parker Ashby.)

Mr. Rolston: I am going to object to any conclusion of this witness.

A. It isn't a conclusion. He talked with somebody. He said, "Bob Mitchell will be around on the 6th—either the 6th or 7th, and we will come over to see the fudge."

Q. He told you that? A. Yes.

Q. But Erhart did not get there until the 12th, is that right?

A. I called Mr. Bower on the 7th. I actually talked to him on the 6th or 7th. He said Mr. Mitchell had not shown up, and he was not coming over until he could get one of the representatives of Karmelkorn.

Q. Mr. Erhart and Mr. Mitchell did appear at your office on or about January 12, is that correct?

A. That is correct.

Q. Did you have any conversation with Mr. Bower on that day?

A. I don't recall. I don't believe, however, it was that day.

Q. If I show you the original purchase order, which is dated January 12, 1943, No. 4312, would that help you refresh your memory as to whether or not you saw Mr. Bower?

A. It would not particularly prove anything, or [93] refresh my memory.

Q. Whether it proves something, Mr. Ashby, is not your concern. I ask whether or not it refreshes your memory.

A. It does not refresh my memory. I might have

(Testimony of Ralph Parker Ashby.)
seen Mr. Bower that day, yes, but whether we talked fudge, I am not prepared to say.

Q. Yet, to your recollection, it was the same day Mr. Erhart was in your office, January 12th, that you stopped payment of the account, is that right?

A. It was after my conversation with these two gentlemen.

Q. Do you know whether or not it was after you placed this order with Bower-Giebel?

A. Is that the same one?

Q. The same one I just showed you, of January 12th.

A. I don't recall exactly, but I would imagine, if this is dated the same day, I apparently placed this in the morning, and these gentlemen came over a little later on in the day.

Q. Was any of the fudge stored at the pool stockroom for more than 30 days?

A. Do you mean of the original distribution?

Q. That's right.

A. I can't answer that from my own knowledge, because I don't have anything on this item, but I can tell you how our [94] distribution system works.

The Court: He doesn't want that.

Q. By Mr. Rolston: Did you have any conversation with Mr. Bower regarding over-shipment?

A. Yes.

Q. When was that conversation?

A. I don't recall just when that conversation came up. If there was an over-shipment I would not find it out until after all the merchandise was

(Testimony of Ralph Parker Ashby.)

delivered, or the prior order was checked against the receiving records, so in this case it would be some time after December 6th.

Q. Would it be as late as the week between Christmas and New Years?

A. I am not prepared to state when that was. I don't recall when the conversation occurred. I know there was some conversation about it.

Q. Did you have any conversation with him in January regarding fudge that he had not yet picked up on account of over-shipment?

A. I possibly did, yes.

Q. Do you recall which conversation in January it was? A. I don't recall.

(Short recess.)

Q. By Mr. Rolston: Mr. Ashby, during the conversation that you had on or about November 25th that you testified [95] to, you recall that conversation—did you ever tell Mr. Bower during that time that you could not use the fudge; the order was cancelled, and you were cancelling the entire matter?

A. I don't recall making a positive statement of that kind, no.

Q. You did say something concerning fudge; that you were going to cancel the order during that conversation?

A. I don't remember making the specific statement that we would cancel the order, or that we were going to cancel the order.

Q. Did you say anything to that effect?

A. I don't recall saying that. If you have some-

(Testimony of Ralph Parker Ashby.)

thing that may refresh my memory—I may have intimated that, but I don't recall it.

Q. You don't recall that some time during the conversation that you said you could not use the fudge; that you were going to cancel the order?

A. I don't remember making that flat statement, no.

Q. Did you make any statement during the conversation that you could not use the fudge?

A. Only in relation to——

Q. My question is not that confusing, is it?

A. All right. No.

Q. You did not make such a statement? [96]

A. No.

Q. Did you make a statement to this effect to Mr. Bower during the conversation?

A. It was after, in relation to stop-payment.

Q. Do you mean with regard to the stop-payment, was the only thing that you said during that conversation relating to cancelling the order on the fudge; that you could not use the fudge; is that right?

A. I would like to have you repeat that again.

(Question read by the reporter.)

A. That's right.

Q. During that conversation did you say anything concerning whether or not there was mold on any of the fudge; that is, during the conversation of November 25th?

A. I believe I did point that out, that it was beginning to mold.

(Testimony of Ralph Parker Ashby.)

Q. You have a definite recollection of that?

A. That is to the best of my recollection.

Q. You do have a recollection of that?

A. Of stating that the fudge was beginning to mold around the nuts.

Q. You wrote out the requisition orders, such as Defendant's Exhibit D for identification?

A. No, I did not write that.

Q. Did you direct that that be written? [97]

A. This is the direction right here. This is the order for this.

Mr. Rolston: The witness is referring to G for identification. Exhibit D for identification, Mr. Ashby, is the distribution to the stores, is it not?

A. This Exhibit D, this is not the distribution to the stores.

Q. It is not?

A. No. This is the return from the stores. That was created by the individual stores concerned; not by me. I merely have my name there, because I authorized the return for this order.

Q. Exhibit D was the return on November 15th, is that right?

A. I beg your pardon. This was the requisition returned by the warehouse for distribution to the stores. It was not returned by me, however.

Q. Did you instruct this to be written?

A. There is another spread sheet here attached to my purchase order which shows the specific quantities that I ordered to be sent to each store.

(Testimony of Ralph Parker Ashby.)

Q. Does any of the fudge remain in the central warehouse?

A. Only possibly over night or over a week.

Q. A couple of days? [98]

A. Yes. There is no storage, in other words; it doesn't get into storage.

Q. To your knowledge the first returns from the stores was after January 20th, is that correct?

A. The records will show that.

Q. Do you recall the amount of merchandise that you had actually received at the time of your conversation of November 25th?

A. Let me have that again?

(Question read by the reporter.)

A. No, I would not have that. It would be, again, in the records; other than I knew it was in some relation to the 5,000 pounds, because the amount I actually saw with my own eyes; but the records show the exact amounts.

Q. Calling to your attention Defendant's Exhibit H in evidence, your letter of January 20th, to the third paragraph, where you state, relating to November 25th, it says on this date you had received 13,210 pounds.

A. That's right, because when I wrote this letter I had already phoned the warehouse and got the distribution dates, to just merely tie each other up.

Q. At the time of your deposition had you done that?

A. In making the deposition I hadn't; some of my figures were possibly off. I hadn't thought

(Testimony of Ralph Parker Ashby.)
much about the case for a year, and I didn't recall some of the specific [99] amounts involved, because it was all warehouse records anyway.

Q. In your testimony today you still referred to the 5,000 pounds. You hadn't checked the letter since?

A. I hadn't checked the letter as to the exact amount, because I knew all of this was contained in the warehouse records anyway.

Q. Did I understand you to say, Mr. Ashby, that you have not read this letter since?

A. I have read the letter since making the deposition, yes. I still don't remember the specific tonnage.

Mr. Rolston: That is all.

Redirect Examination

By Mr. Wheeler:

Q. During that period of time, Mr. Ashby, what was the volume of transactions that you were conducting with Mr. Bower—during the period from October, 1943, through to January or February, 1944?

A. I don't recall the exact amounts. We were doing in the nature of $10,000 or so every four weeks. You can get the exact figures from the copies of his invoices which you have. I would say, offhand, in the neighborhood of $10,000 for a period of four weeks.

Q. What items would be included in that volume?

A. We purchased any bulk candies that Mr.

(Testimony of Ralph Parker Ashby.)

Bower might [100] have available; we purchased national brands of candy bars; cigarettes; and once or twice a few cigars. Quite a few cigars in one particular order. There were some cookies. Well, maybe ten or fifteen kinds of candy bars. In other words, quite a large variety of goods.

Mr. Wheeler: I have no further questions.

Mr. Rolston: There is just one thing I overlooked. I want to offer this stop-payment which the witness has testified concerning into evidence.

Mr. Wheeler: No objection.

The Clerk: Plaintiff's Exhibit 3.

The Court: What is the date of that?

Mr. Wheeler: 1/12/44.

The Court: That is the one referred to in the letter, in the last paragraph?

A. Yes, sir.

The Court: Anything further from this witness?

Mr. Wheeler: Not at this time, your Honor.

The Court: Call your next witness. [101]

VICTOR POCIUS,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Please state your name.

The Witness: Victor Pocius.

Direct Examination

By Mr. Wheeler:

Q. Mr. Pocius, you reside in Chicago, Illinois, do you? A. Yes, sir.

(Testimony of Victor Pocius.)

Q. What is your business there?

A. Confectionery manufacturing, retail and wholesale.

Q. Do you conduct a business under the name of Karmelkorn Kommissary? A. Yes, sir.

Q. Were you conducting such a business in candy under that name from the period October, 1943, through February, 1944? A. Yes, sir.

Q. Are you a part of the Sears-Roebuck and Company organization? A. No, sir.

Q. Did you receive an order from the Bower-Giebel Company for Pan O' Butter Fudge in October of 1943? A. Yes, sir.

Q. Who acted as your salesman in that transaction?

A. The salesmen were brokers, Mr. Alphonse Erhart and [102] Mr. Bob Mitchell.

Q. Did you send any sample of fudge to Mr. Erhart and Mr. Mitchell? A. Yes, sir.

Q. During the month of October?

A. Mr. Bob Mitchell and Mr. Alphonse Erhart were in Chicago at the time and took a sample with them, I believe.

Q. What were the characteristics of that sample of fudge?

Mr. Rolston: To which we object as too indefinite and ambiguous, and having no materiality at this time.

The Court: I don't know. It relates to the condition of the candy. We have had a discussion of the candy.

(Testimony of Victor Pocius.)

Mr. Wheeler: It is corroborative merely as to the condition of the candy, your Honor.

The Court: Read the question.

(Question read by the reporter.)

The Court: Overruled. I think there was some testimony about making a change, and putting in more nuts. You may answer.

A. Do you mean in what shape was the merchandise?

Q. By Mr. Wheeler: Yes; what kind of fudge was it?

A. It was a cream fudge made with sugar and butter. The ingredients were all on the label just like any other [103] fudge. You have all eaten it.

Q. It had pecans in it, did it? A. Yes.

Q. And it had pecan halves placed on top?

A. Yes.

Q. Was the candy moist or wet at the time it was given to Mr. Erhart and Mr. Mitchell?

Mr. Rolston: I object to that as immaterial, as to what the condition of the sample was at that time.

The Court: Overruled.

A. May I answer?

The Court: Yes.

A. When the fudge was handed to Mr. Alphonse Erhart and Mr. Bob Mitchell it was in good shape.

Q. By Mr. Wheeler: Was it wet?

A. No.

Q. Did it have any accumulation of water around the nuts?

(Testimony of Victor Pocius.)

Mr. Rolston: To which I am going to object as leading his own witness; cross-examining his own witness.

The Court: I will sustain the objection. He is your own witness.

Q. By Mr. Wheeler: You did receive an order from Bower-Giebel Company?

A. Yes, sir. [104]

Q. What was the date on which you gave the sample to Mr. Erhart and Mr. Mitchell?

A. The date of the order?

Q. The date on which you gave the sample to Mr. Erhart and Mr. Mitchell.

A. I couldn't tell you the exact date.

Q. Do you recall the date of the order that you received from Mr. Bower?

A. No, I don't. It was some time in October.

Q. Do you recall the amount of the order?

Mr. Rolston: To which I object as outside the issues, and immaterial, how much fudge was ordered by Bower-Giebel.

The Court: I don't think the amount is in dispute, is it?

Mr. Wheeler: This goes to the testimony of a later letter, the date of a later letter, your Honor. The purpose is to show by this witness, among other things, that there was fudge purchased in addition to that which went to Sears-Roebuck and Company.

The Court: What materiality would that be? We are not concerned with what was purchased

(Testimony of Victor Pocius.)
separately. The main point we are concerned with is whether this fudge was in bad shape when it reached here.

Mr. Wheeler: As a part of the testimony of this witness I intend to show that the fudge which was sent was not of the [105] standard of the sample, and that Mr. Pocius came out here and made a settlement with Mr. Bower, recognizing that the entire amount which was sent was not good candy, so this Sears portion was a part of an entire transaction.

The Court: All right. It may go in, and I will reserve a motion to strike if it is not connected up, because ultimately the fact that he made a settlement would not be material unless it constitutes an admission on the part of Bower, or on their part, that it was defective.

Q. By Mr. Wheeler: Do you recall the amount of the order that you received?

A. There was a written order on that, but the poundage was 100,000 pounds, I believe.

Q. Did you send any other samples to Bower-Giebel Company after this first one, which was given to Mr. Mitchell and Mr. Erhart?

A. There was one by airmail, directly to Bower-Giebel.

Q. Did you examine that sample prior to the time that it was sent? A. Yes, sir.

Q. What was the condition of that sample at the time you examined it?

(Testimony of Victor Pocius.)

A. The same as the first one, only with more nuts on the inside, and more nuts on top.

Q. When did you send that sample? [106]

A. The date I don't remember.

Q. It was subsequent to the first sample?

A. Yes, sir.

Q. Could you fix it with reference to the date of the letter which you wrote with reference to the OPA? Was it prior to that letter?

A. It was after, I believe. I am not positive about that.

Q. The date of that letter is November 13th?

A. Yes. It was after the last sample.

Q. You mean the letter was after the last sample? A. That's right.

Q. Did you, in accordance with the order that you sent to Mr. Bower, send fudge to Los Angeles to the Bower-Giebel Company?

A. That's right.

Q. What was the condition of that fudge with reference to moisture?

A. In Chicago it was perfect.

The Court: May I have the answer?

(Answer read by the reporter.)

Q. By Mr. Wheeler: Was there any candy which was sent which was moist or wet, in Chicago?

A. No, sir.

Q. Did you have any discussion with Mr. Bower concerning [107] the fudge which you sent to California?

Mr. Rolston: To which I am going to object

(Testimony of Victor Pocius.)

unless it is concerning the fudge which is involved here.

Mr. Wheeler: It is subject to the same motion to strike.

The Court: Yes, unless it is shown it is part of the same shipment, or some admission of its condition. Overruled. A motion to strike will be reserved.

A. May I have the question?

(Question read by the reporter.)

A. At what time?

Q. By Mr. Wheeler: At any time.

Q. I believe I had a telephone discussion with Mr. Bower about a week before Christmas, somewhere in that week. I don't recall any other conversation at that time. There might have been.

Q. Do you recall the conversation that you had with him at that time?

A. No, I don't, but I believe that that was the conversation that made up my mind to come here to see Mr. Bower.

The Court: What did it concern?

A. On the distressed merchandise that he had on hand; in relation to that.

Q. By Mr. Wheeler: When you say "distressed merchandise", [108] you are referring to the Pan O' Butter Fudge? A. Yes, sir.

Q. You didn't ship any more?

Mr. Rolston: Mr. Wheeler is practically cross-examining his own witness.

(Testimony of Victor Pocius.)

The Court: No. We know that distressed merchandise has a technical meaning.

Q. By Mr. Wheeler: You came to Los Angeles, then, did you? A. Yes, sir.

Q. Did you have a discussion with Mr. Bower there about the candy? A. Yes, sir.

Q. Where did that discussion take place?

A. At the Bower-Giebel office.

Q. Did you make any examination of candy at the time?

A. Yes, sir, about eight or ten cases.

Q. Where were those boxes of candy stored?

A. In the rear of his office, which was his warehouse.

Q. What was the condition of those eight or ten cases?

Mr. Rolston: To which I am going to object——

Mr. Wheeler: It is all subject to the same objection and motion to strike.

The Court: Overruled.

A. Some of the merchandise was damp, and some of the [109] merchandise was useable and edible.

Q. By Mr. Wheeler: Do you recall whether any part of it had a mold on it at the time?

A. No, sir.

Q. Did you have any conversation with Mr. Bower concerning an adjustment of the price?

A. Yes. That was the first day I talked to him, and I asked him if he wanted me to take this merchandise back, or if he wanted to salvage it at a

(Testimony of Victor Pocius.)

price. He said, "I would like to take it at a price." Those aren't the exact words of our conversation.

The Court: The substance?

A. Yes; and we agreed that the next day we would sit down and figure it out.

Q. By Mr. Wheeler: Did he state any reason to you why he wanted it at a price rather than having you take it back to salvage it?

A. No; our conversation was a long, drawn-out affair.

Q. By the Court: Did he discuss any other shipments that had been made, or any complaints of Sears-Roebuck and others?

A. Yes, he made mention of several companies. Who they were I don't remember, but I think he mentioned Sears.

Q. Did he say the merchandise had been found unsatisfactory by others? [110]

A. At this figure of 20c a pound I would rather have taken it back to Chicago and re-worked it, but he said he had a lot of shipments to take back—from who and where, I don't remember the names, but I don't think he mentioned Sears, but he had to reimburse people; and I bought it at 20c apound.

Q. By the Court: When you shipped it to him it was not with the idea of filling any specific order he had placed with you?

A. I sold directly to Bower-Giebel.

Q. You did not know, for instance, he had a contract to sell 28,000 pounds to Sears, or anybody else?

(Testimony of Victor Pocius.)

A. No, but I did know he sold to Sears. That was mentioned by the brokers at that time.

Q. That was the only shipment? Whatever resale he made was made out of that one shipment of 100,000 pounds? A. That's right.

Q. And they were not earmarked for any customer at all? A. No, sir.

Q. You just sent the merchandise to him on a straight sale? A. That's right.

Q. By Mr. Wheeler: What was the manner in which you made the adjustment?

Mr. Rolton: My objection goes to all of these questions [111] I understand?

Mr. Wheeler: Yes.

A. The adjustment was made on the invoices that he had stopped payment on.

Q. You mean that Mr. Bower had stopped payment on your invoices?

A. Yes, and merchandise also en route.

Q. What was the adjustment that you gave him?

A. On thirty some thousand pounds I took a loss of 30c a pound.

Mr. Rolston: I move to strike "I took a loss."

The Court: Don't say "loss".

A. I deducted 30c a pound on 30,000 pounds.

The Court: What was the original selling price?

A. 50c.

Q. By Mr. Wheeler: Did you make any further reduction or deduction in price?

A. On 7,776 pounds he paid me 32 and a quarter cents a pound.

(Testimony of Victor Pocius.)

Q. Was this candy made for the Los Angeles area with conditions in the Los Angeles area in mind?

A. Yes, we had taken that into consideration.

Q. In what way?

Mr. Rolston: To which we object as immaterial, and outside the issues. [112]

The Court: Yes, I think we are getting away from the issues a great deal. I will sustain the objection.

Q. By Mr. Wheeler: My Pocius, you have been in the candy manufacturing business for some time, have you? A. Yes, sir.

Q. For how long a period should fudge of this kind keep?

A. It all depends on the weather and conditions surrounding it. In certain climates it can stay six months; in certain climates it will spoil in any length of time.

Q. Would you explain that answer further, as to what type of weather affects candy?

A. Moisture; humidity.

Q. In other words, it won't stand up as well?

A. That's right.

Mr. Wheeler: I have no further questions.

Q. By the Court: They are sent out in air-tight containers, are they not?

A. Yes.

Q. And then they are kept in a dry warehouse?

A. Pardon me; I will explain how these were packed. 9-pound fudge was packed in individual

(Testimony of Victor Pocius.)
containers with a top and bottom lid in which are liners, and then two of these containers were put in one cargo container 14 by 14, by four [113] and a half inches high.

Q. Made of cardboard? A. Yes.

Q. Assuming that they were not opened, but were placed in a dry warehouse in that period of the year, November and December, how would the atmospheric conditions affect it?

A. We naturally cook it for California. You have a little moisture in it, because of the dryness of it, and naturally, when it was put in a warm or heated store it would be suitable for sale.

Q. Assuming you have got that margin of safety or tolerance, or whatever you call it in your manufacturing? A. Yes.

Q. It had a little tolerance. Suppose it were kept in a dry warehouse, and not opened, and not on the shelf more than a day, how should it stand up under those conditions?

A. It would stand up all right, but here we had a condition on the way, which we don't have in our own vicinity, of anywhere from six to thirteen days shipment.

Q. It was rather a long shipment, is that the idea? A. Yes.

Q. You think that long period of shipment may have accounted for it, is that right?

A. It might have been that. We don't know.

Q. But you were satisfied, when you got here,

(Testimony of Victor Pocius.)
from the [114] sample that something was wrong with the merchandise, weren't you?

A. Yes. Some was good and some was bad.

Cross Examination

By Mr. Rolston:

Q. It is a fact, is it not, that Mr. Bower cancelled his order prior to this adjustment?

A. He cancelled his order, to my recollection, by stopping payment on his checks.

Q. Didn't he wire you and stop payment of the order?

A. That I don't recall at this time. He might have. If there was any such papers they would be the proof of it.

Q. Mr. Pocius, you still do business with Sears-Roebuck, do you not? A. Yes, sir.

Q. You have outlets in all their stores around Chicago and that area?

A. No, I don't have any concession.

Q. A great many stores?

A. No; I sell a few of their stores in Chicago, but not all of them.

Q. Is your volume with Sears back in that territory as high as $1,000 a day? A. No, sir.

Q. Is it close to that figure? A. No, sir.

Q. That is, of volume, I mean?

A. Yes, sir.

Q. Are you going to be leaving Los Angeles soon? A. Tomorrow, at 12.

Q. When did you get in to Los Angeles?

A. Yesterday at 9:15 in the morning.

(Testimony of Victor Pocius.)

Q. Is Sears-Roebuck paying your expenses on this trip? A. That has not been discussed.

Q. Were some of the shipments that you made adjustment on shipped after you received a stop-order by wire? A. Yes, sir.

Q. That was one of the considerations of the settlement with Bower? A. That's right.

Q. A further consideration was that the shipments were arriving too late for the Christmas trade?

A. No, because he said he sent his order to stop or to cancel his checks, and we had a conversation to the effect that he did not want any more fudge.

Q. It was too late in the year?

A. No, there was no discussion of the weather at the time.

Q. I say the season; not the weather. [116]

A. No.

Q. It is your definite recollection at the time of the adjustment there was no discussion with Sears whatsoever concerning the Sears merchandise whatsoever? A. No.

Q. You adjusted each invoice, invoice by invoice, is that right? A. No, sir.

Q. That is not right?

A. I adjusted each invoice per invoice, yes, but there is an explanation for that.

The Court: You have a right to give it.

A. The merchandise he had in stock, we didn't take invoice per invoice, and check invoice per case, or the amount of stock he had against each invoice.

(Testimony of Victor Pocius.)

We took the whole total of invoices, and he paid me at the rate of 20c per pound.

Q. By Mr. Rolston: That was done invoice by invoice, was it not?

A. Yes, upon invoice per invoice, upon the unpaid invoices.

Q. The invoices, then, were not due?

A. They were due; otherwise he would not have the invoices.

The Court: He did not take back any of the merchandise at all? [117] A. No, sir.

Q. Do you remember how much was shipped on this shipment? A. 83,000 pounds.

Q. 83,000 pounds of a maximum of 100,000 pounds? A. Yes.

Mr. Rolston: At this time, your Honor, I would like to strike all the testimony concerning the adjustment as having no materiality in this case, and is no evidence one way or the other.

The Court: I will deny the motion. When a manufacturer himself comes out here, at the request of the agent who made the resale, and admits that the merchandise was not in a merchantable condition, and makes an adjustment, it is corroborative of the fact that the candy was not in a merchantable condition.

Mr. Rolston: There is no evidence that it was merchantable at the time it was shipped.

The Court: We will argue that later on. Evidently he thought he was responsible.

Q. The adjustment was made upon the entire

(Testimony of Victor Pocius.)
shipment, of which Sears' merchandise was a part? The adjustment was made on the 83,000 pounds, isn't that correct?

A. No; the total merchandise shipped was 83,000.

Q. What was the adjustment made on? [118]

A. 38,000 pounds.

Mr. Rolston: I want to go into something else.

The Witness: That is the number of unpaid invoices he had, and we naturally took those to establish our credit to himself and his customers.

Q. By Mr. Rolston: Mr. Pocius, I show you a document which purports to be an invoice of the Karmelkorn Kommissary, No. 1067, under date of 12/15/43, addressed to Bower-Giebel Wholesale Company. Is that one of the invoices covering this merchandise? A. I presume it is.

Q. That is on your stationery?

A. That's right; it is on my stationery.

Q. You saw that on or about December 30th at the Bower-Giebel Wholesale Company, did you not? A. Yes, I probably did.

Q. I show you a check of Bower-Giebel Wholesale Co., check No. 4052, dated December 30, 1943, and ask you if that is the check in payment of that invoice? A. Yes, sir.

Q. I see the invoice bears certain figures in handwriting. Were those figures placed there in your presence? A. Yes, they were.

Q. The final price of the invoice is $791.67, is that right? [119] A. Yes, sir.

Q. That was the amount that you and Mr. Bower

(Testimony of Victor Pocius.)

arrived on, as payment for the 5,868 pounds of Pan O' Butter Fudge represented by that invoice?

A. That's right.

Q. So this check pays for this invoice?

A. Yes.

Q. There were no other considerations except the merchandise represented by this invoice?

A. You misunderstood. We can go through all the invoices, and deduct along the same lines. You don't understand our idea, when we did that.

The Court: You had better explain that. There is confusion in counsel's mind and mine, too.

A. I went into Bower-Giebel's. He had all his fudge sitting around the room, and we took the invoices, and counted out case for case. Whether he had his case right on the floor, I don't know; but we reduced it to 20c a pound.

The Court: Instead of 50?

A. Yes.

Q. You arbitrarily cut down the price paid to 20c a pound.

A. Yes, except what was en route.

Q. What was en route?

A. I paid 32 and a quarter a pound. [120]

Q. That settlement you made brought down to date on the entire shipment?

A. That's right.

Q. On both the amount paid for, and that which was unpaid?

A. That's right. If he had paid me on each

(Testimony of Victor Pocius.)
individual invoice, then we would have counted case for case.

Q. In other words, you would have to have a proportionate reduction on each invoice?

A. That's right.

The Court: That is what I thought. I don't think the adjustment is so important, but rather the fact that the manufacturer admitted there was defective merchandise in every shipment.

Mr. Rolston: That was not the basic reason for the adjustment.

The Court: That is a matter of argument. There is evidence that other merchandise was up to what it should have been. You will have your opportunity to rebut that testimony to show that it was all right, and to show that your adjustment was on other grounds. I merely have to rule upon the materiality of the evidence. I don't have to decide this case now; and certainly it is material when he comes out here and admits he was satisfied that the merchandise [121] was not merchantable, or a good portion of it. He was the manufacturer, and Bower-Giebel were his agents in the resale.

Mr. Rolston: They weren't agents.

The Court: They purchased from him.

Q. By Mr. Rolston: During the months of October, November and December, 1943, you were at that time doing business with Sears, Roebuck and Company direct, were you not, in Chicago?

A. Yes.

(Testimony of Victor Pocius.)

Q. And have been ever since that time, is that right?

A. Yes. We laid off in interval periods.

The Court: You never, however, sent a direct shipment to any of their stores upon an order direct, except this one to Bower-Giebel, is that correct? A. Until December 2, 1944.

Q. I mean prior to this order. A. No.

Q. You had not sent anything direct to their warehouse, or to the main store here, or to any of the branches? A. No, sir.

Q. By Mr. Rolston: Do I understand at the present time you are selling Sears, Roebuck direct?

A. That is right.

Q. You have been shipping them in the past 30 days or more? [122]

A. One shipment, December 2, 1944.

Mr. Rolston: I want to reserve the right to recall the witness under 2055.

The Court: It is only 4 o'clock. We don't quit until 5.

Mr. Rolston: In order to properly introduce the evidence, then, your Honor, I want to go through the invoices and show that each payment was made by each invoice. The witness has already testified concerning Bower's check No. 4056, and the invoice 1067 which paid for it.

The Court: All right. I think probably you can stipulate that was a fact, subject to his explanation. You can go ahead and put them all in without taking the time to go through them, because you will

(Testimony of Victor Pocius.)
show each check corresponds to the corresponding invoice.

Mr. Wheeler: I have copies from Mr. Pocius.

The Court: Put them all in, and give each a number, so the clerk will identify it. No further foundation is necessary. Counsel do not insist on a further foundation.

The Clerk: This will be marked 4 in evidence.

The Court: You can put them in as one exhibit, and mark them A, B, C and D, along the line, and they will show for themselves.

Mr. Rolston: Do you mean they will be 4-A, 4-B, and so forth? [123]

The Court: Yes.

Mr. Rolston: There is no use of cluttering up the record with the bills of lading. The check and invoice will be all right.

The Court: Invoice No. 1035 will be 4-B.

Mr. Rolston: Invoice 1036; check No. 4040.

The Clerk: 4-C.

Mr. Rolston: Invoice No. 1038; check 4039.

The Clerk: 4-D.

Mr. Rolston: Invoice 1039; check 4042.

The Clerk: 4-E.

Mr. Rolston: Invoice 1044; check 4043.

The Clerk: 4-F.

Mr. Rolston: Invoice 1059; check No. 4049.

The Clerk: 4-G.

Mr. Rolston: Invoice No. 1061; check No. 4050.

The Clerk: 4-H.

(Testimony of Victor Pocius.)

Mr. Rolston: Invoice No. 1064; covered by check 4051.

The Clerk: 4-I.

Mr. Rolston: May I have 4-I? Mr. Pocius, I show you Exhibit 4-I, and which is invoice No. 1064 in the amount of $855.00. Is that the correct billing price? A. Yes, sir.

Q. There was no adjustment made on that invoice, was there? [124]

A. No, sir.

Q. In other words, that invoice was paid in full?

A. That's right.

Q. By check No. 4051, which is attached to it?

A. That's right.

Q. That was also given to you on December 30th, at the time of the adjustment, is that right?

A. That's right.

Q. That invoice was also unpaid at that time, is that right? A. Evidently it was.

Q. In other words, your statement made previously that all unpaid bills were discounted if unpaid is not exactly right, is that correct?

A. That's right.

Mr. Rolston: Invoice 1073; check No. 4062. Next in order.

The Clerk: 4-J.

Mr. Rolston: Invoice No. 1075; check No. 4063.

The Clerk: 4-K.

Mr. Rolston: Invoice No. 1034; check 4037.

The Clerk: 4-L.

Mr. Rolston: Invoice No. 1033; check No. 4037.

(Testimony of Victor Pocius.)

The Clerk: 4-M.

Q. Mr. Pocius, each shipment that was made to the Bower-Giebel [125] Wholesale Company was sampled by Mr. Mitchell during your presence in Chicago, is that right?

A. That is, when I was in Chicago, yes.

Q. Did he show you these samples?

A. When I was there, he did.

Q. All the samples that you saw were in the same condition, and of the same standard as the sample which had previously been shipped out to Bower-Giebel, is that correct?

A. That is correct.

Q. And made in the same manner?

A. All alike. That is, to the best of human possibility, of holding within a degree or two.

Q. In other words, as far as you observed, all shipments were up to and equal to the sample?

A. That's right.

Q. When you saw the merchandise at the Bower-Giebel Wholesale warehouse do you know how long it had been there? A. No, sir.

Q. Do you know under what conditions it had been stored? A. No, sir.

Q. After it was received by them?

A. By Bower-Giebel?

Q. Yes. A. No. [126]

Q. Do you know how they were shipped?

A. By what truck line?

Q. Yes. A. By the Ringsby Motors.

(Testimony of Victor Pocius.)

Q. Were they instructed to be shipped in refrigerated cars?

A. I believe that was on the bill of lading. I won't say specifically.

Q. Do you know whether or not they were shipped in refrigerated cars?

A. That I don't know.

Q. Did the cases each have labels on them showing how the goods had been packed or shipped?

A. Yes, they had an instruction on there.

Q. Do you recall what that instruction was?

A. I believe it was on the side of the case. It said not to stack four or seven high; I don't know which.

The Court: That was to prevent breakage of the cartons, is that correct? A. That's right.

Q. By Mr. Rolston: Is it not a fact, Mr. Pocius, that the extra weight would also have a tendency to squeeze the moisture out of the fudge?

A. Yes, sir.

Q. That was one of the reasons why it should not be [127] packed more than four high or seven high, whichever it was? A. That's right.

Q. So that possibly was one of the elements that may have caused this fudge to be moist at Mr. Bower's, might it not,—the fact they were stacked too high after they were received, is that right?

A. Definitely.

Q. Where they were stored after they were received? A. That's right.

(Testimony of Victor Pocius.)

Q. And whether or not they had been opened, and how long they had remained open, is that right?

A. Yes, sir.

Q. Also the weather conditions existing in Los Angeles; whether or not the humidity was up or down; that might affect it? A. That's right.

Q. Whether or not it was damp or dry would also affect it? A. Yes, sir.

Q. All those elements and factors enter into whether the fudge will remain in perfect condition or become moist, or in another case, dry?

A. That's right.

Q. You have no knowledge of your own how Sears, Roebuck handled the fudge out here? [128]

A. No, sir.

Mr. Rolston: That is all at this time, your Honor.

Mr. Wheeler: I have no further questions. May the witness be excused?

The Court: Just one more question: Mr. Bower, in asking for the adjustment, complained about the quality of the merchandise, didn't he?

A. Yes.

Mr. Rolston: To which I will object, if I may register my objection.

The Court: You may object to any questions I ask. I want to get back to the idea that he did not give 30c for nothing. He complained of the quality of the merchandise? A. Yes.

Q. It showed dampness? A. Yes.

(Testimony of Victor Pocius.)

Q. You made the adjustment, because you thought the complaint was legitimate?

A. Yes.

Q. You did not cut 30c out of the 50c just to be friends with him, did you? A. No, sir.

Mr. Rolston: May it be understood that my objection goes to the court's questions?

The Court: Certainly. I wanted to go back to see [129] what this man paid 30c a pound for. I am through.

Q. By Mr. Rolston: Isn't it a fact, Mr. Pocius, that Mr. Bower asked for authority to return the merchandise, and also that the goods en route would be returned? A. Yes, sir.

Q. He asked you?

A. No, he did not. He asked it in a wire. I think in his wire, or he had a letter to that effect.

Q. He asked you to take back the merchandise, is that correct? A. Yes, sir.

Q. You did not want to take back the merchandise, did you? A. No, I did not say that.

The Court: On the contrary, he said he offered to take it back.

A. There is a witness to the effect of what happened; Mr. Bob Mitchell.

Q. When you got here you offered to take it back?

A. Yes, I asked him "Do you want me to take it back, or do you want to salvage it?"

Q. Then you agreed on this basis?

A. Then he told me he had more merchandise

(Testimony of Victor Pocius.)

outstanding, so at 20c a pound which was the price he quoted, he said his customers and himself could make out. [130]

Q. By Mr. Rolston: Mr. Pocius, I show you a copy of a telegram from Los Angeles, dated December 21, 1943, addressed to Karmelkorn Kommissary. Did you receive the original of that?

A. Yes, sir.

Q. Will you read it?

A. "Telegraph or write your written authority to return fudge in harmony with your verbal authority yesterday."

Q. At the time of this telegram Mr. Bower had offered to return the fudge, had he not?

A. Yes, no doubt he had.

Q. Did you not want the fudge back at that time, is that right?

A. No, I wanted it back at that price.

Q. Did you wire him to return the fudge?

A. No, I didn't. As part of our conversation, I was coming out here.

Mr. Rolston: I will ask that this telegram be introduced in evidence.

The Court: It may be received.

The Clerk: Plaintiff's 5.

Q. By Mr. Rolston: So that prior to your coming out to California in 1943, in December, Mr. Bower had offered to return all of the merchandise he had on hand, is that right?

A. Prior to that, yes. [131]

Mr. Rolston: That is all.

The Court: Just a minute. I want to look at this telegram. All right.

Mr. Wheeler: I have no further questions.

The Court: Call your next witness.

Mr. Wheeler: Mr. Erhart.

ALPHONSE ERHART,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Please state your name.

The Witness: Alphonse Erhart.

Direct Examination

By Mr. Wheeler:

Q. Mr. Erhart, you are a resident of Los Angeles, are you?

A. At the present time, yes.

Q. You are a broker in the candy business?

A. Candy and food, yes, sir.

Q. How long have you been a broker in the candy and food business? A. 15 years.

Q. I call your attention to Pan O' Butter Fudge, and particularly to the month of October, 1943. I will ask you [132] if you called at the office of the Bower-Giebel Company, in the City of Los Angeles, during the latter part of October, 1943?

A. Yes.

Q. Did you call with reference to Pan O' Butter Fudge? A. Yes.

Q. Did you have a sample of the Pan O' Butter Fudge with you at that time? A. Yes.

Q. Did you meet Mr. Ashby, of Sears, Roebuck

(Testimony of Alphonse Erhart.)

and Company, at the office of Mr. Bower, on the occasion of your visit?

A. For the first time, yes.

Q. How long had you been at Mr. Bower's office before you met Mr. Ashby?

A. About an hour.

Q. Did you have any conversation with Mr. Ashby at the time?

A. Very little. My conversation, along with Mr. Mitchell, was with Mr. Bower with regard to the fudge. There was very little conversation after Mr. Ashby arrived, which went on between Mr. Mitchell, myself and Mr. Ashby. The conversation was between Mr. Ashby and Mr. Bower, as he was Mr. Bower's customer, and not our customer.

Q. You were present during the conversation between Mr. [133] Bower and Mr. Ashby?

A. Yes.

Q. Will you relate the conversation that occurred at that time?

A. Between Mr. Ashby and Mr. Bower?

Q. Yes.

A. Well, to the best of my knowledge, Mr. Bower called Mr. Ashby and mentioned the fact that he had a chance to get a good quantity of fudge. He thought it was pretty good. Mr. Ashby was interested, and he must have said yes, and said he would be over. Mr. Bower hung up and said, "Mr. Ashby will be over shortly, gentlemen." I think Mitchell and myself walked around and had a smoke or something until Mr. Ashby arrived. When

(Testimony of Alphonse Erhart.)

he arrived he went to Mr. Bower's desk and Mr. Bower and Mr. Ashby at that time went over the fudge sample very thoroughly. They went back and forth about the price and quality, and there was some discussion with regard to the OPA by Mr. Ashby or Mr. Bower, and Mr. Bower turned to myself and my associate, and it went along, the the result of the conversation, and the examination of the sample, was that Mr. Ashby gave Mr. Bower a purchase order in the amount of 28,000 pounds of fudge.

Q. Do you recall whether the fudge was cut at that time?

A. Yes, it had been cut previous to Mr. Ashby's arrival, by Mr. Bower, and sampled, in the little office there, and also it was cut after Mr. Ashby arrived, and he sampled it.

Q. What was the appearance of the sample at that time?

A. To my mind it was in excellent condition.

Q. Do you recall any further conversation with reference to more nuts in the candy, or on the candy?

A. Yes, Mr. Ashby suggested making a change in the fudge to the extent of putting more and larger nuts on top, and we had been placing some broken pecans in the mixture, not in chopped nut form, but large broken ones, and he suggested it would be better if we would add more and have them chopped and finer. He made that suggestion; Mr. Bower turned to us and wanted to know could

(Testimony of Alphonse Erhart.)

we get it done. We felt pretty sure, and said yes, and it subsequently was done.

Q. Was a second sample sent by Karmelkorn Kommissarly to Mr. Bower?

A. Yes, it was sent while Mr. Mitchell and I were in Chicago.

Q. Did you examine that sample?

A. In Chicago?

A. No, Mr. Mitchell did.

Q. You don't recall seeing it?

A. No. Mr. Mitchell remarked to me, so did Mr. Pocius, that the sample had been sent by air express. [135]

Q. Did you have any further conversation with Mr. Ashby after this meeting? Did you have any further conversation with Mr. Bower on or about November 25th?

A. I had a further conversation with Mr. Bower the same day, after Mr. Ashby left.

Q. Yes.

A. Are you passing that over, or going forward to another time?

Q. Yes.

Mr. Rolston: What was the question?

Mr. Wheeler: As to whether he had a conversation with Mr. Bower on or about November 25th.

A. The latter part of November I received a call at my office to call Mr. Bower. I called him back as soon as I received the message. He asked me to come to his office at that time. I did; I came to his office, and he asked me——

(Testimony of Alphonse Erhart.)

Mr. Rolston: Just a minute. You have not been asked for the conversation.

Q. By Mr. Wheeler: Did you have a conversation with Mr. Bower at that time? A. Yes.

Q. What was the conversation?

Mr. Rolston: To which I will object as immaterial, and outside of the issues. [136]

Mr. Wheeler: I am not particularly interested in it other than this:

Q. Did he ask you at that time to go over to Sears, Roebuck and Company? A. Yes.

Q. Your answer was? A. He did ask, yes.

Q. Did you go over to Sears, Roebuck and Company? A. I did.

Q. What occurred while you were at Sears, Roebuck and Company?

A. In stating this, may I say this as it occurred?

The Court: So far as you don't wander too far afield.

A. When I walked into Mr. Ashby's office——

The Court: I notice Mr. Rolston has not objected.

A. As I walked into Mr. Ashby's office, the first thing I noticed, on the lefthand side as I was going in the door, was a table on which there was a considerable — I would say 60 or 90 pounds of fudge, packed up in a manner which was not very attractive, either as to the piling, or the quality. It looked rather bad. I said how do you do to Mr. Ashby. He said, "I have a little difficulty with the fudge, Mr. Erhart. I don't know what to make of

(Testimony of Alphonse Erhart.)

it; it is so moist; I don't know what to make of it." I said, "The way this has been handled, it is hard for me to make an inspection [137] either for Bower-Giebel or for Karmelkorn, and be fair." He said, "Let us go in the stockroom", which was some distance away. We went into the stockroom, and they took apart three or four boxes, cartons, and Mr. Ashby said, "Each box has two or three inner cartons in which there is a slab of fudge." That slab was wrapped thoroughly with waxed paper. We finally came back into his office, and after working back and forth on what could be done with it, I merely made a recommendation, which Mr. Ashby approved, to the effect that I felt that the sweating of the fudge was due to the high altitude and warmer climate, and had caused moisture to the fudge which would dry out if it was allowed to take the waxed paper off of the part to be used the next day, and take the waxed paper, and spread it over each individual carton, and further leaving the fudge exposed either in the stockroom over night, or at the selling counter downstairs, so that the air could dry the slight moisture. It was moisture, like in taffy. It was a good fudge, except that it was moist. I made that recommendation to Ashby. He signified he would try it on that basis. He said, "That seems logical. We will try it." I turned and said, "Inasmuch as you have destroyed here, or made unsalable, a matter of 60 or 80 pounds, I will make a recommendation to Karmelkorn to give you a replacement. I can only recommend that, but my

(Testimony of Alphonse Erhart.)

firms as a rule do not reject my recommendation." At the same time [138] Mr. Ashby wrote a replacement request. He did not ask me to sign it. I purposely avoided signing it, because I was in no position to, because we had not sold Sears, Roebuck; that was the way I felt, so I evaded that.

The Court: Nobody is criticizing your action.

A. I was very much interested. I did not commit myself or Karmelkorn. I was in no position to make any commitment, and Mr. Ashby did not make an issue of it one way or the other. I went back and reported it exactly to Mr. Bower. Mr. Bower thanked me for it. I heard nothing further about any trouble with Sears, Roebuck until I returned from the north, after Christmas. It was at that time my associate, Mr. Mitchell, told me we had better go down and see Mr. Bower; that there was some more trouble at Sears, Roebuck.

Q. By Mr. Wheeler: You did go down and see Mr. Bower?

A. Mr. Mitchell and I both went down at that time.

Q. Did Mr. Bower at that time ask you to go to Sears, Roebuck and Company? A. Yes.

Q. Do you recall the date?

A. It was early in January.

Q. Can you fix it more definitely than that?

A. I would say it was before the 15th, because I left [139] for Seattle the day after Christmas, and I returned, I would say, around the 10th or 15th; somewhere in there.

(Testimony of Alphonse Erhart.)

Q. What happened at Sears, Roebuck and Company on the occasion of this second visit?

A. Well, we went to see Mr. Ashby. He took Mr. Mitchell and I back to the storeroom, and there we opened a matter of 10 or 15 cases of fudge; the complete cases and the inner cartons. Do you want me to continue?

Q. Yes.

A. We opened them up. Some were moldy around the nuts; others were dried out, and when fudge dries out it sort of becomes very white-looking, like chalk, as someone previously remarked, and said if you just dropped it on the floor, it would not break. Amongst it, though, we found one or two slabs of fudge which could be used, which were in fair condition. There was no use denying that the fudge at this time was unsaleable, either from the fact that it was moldy or moist, or dried out. The moldiness came from the moisture around the nuts. Some had become a little more sweaty than others, and had discolored the carton, and some went right through the inner and outer carton. We saw it, and I imagine I must have made some remarks that there was no use of anyone talking to a man like Mr. Ashby, who had been, a professional buyer——

Mr. Rolston: No—— [140]

The Court: Tell us what you said.

A. I just said the fudge was bad; the majority of it.

Q. By Mr. Wheeler: Do you recall a conversa-

(Testimony of Alphonse Erhart.)

tion to the effect that some times you would question a customer, but in this case there was no question about the condition of the fudge?

A. I no doubt referred that there was no question about the condition of the fudge. I do recall saying that I admitted the fudge was bad, that the biggest part of the fudge was in bad shape.

Q. You then went back and reported to Mr. Bower, did you?

A. Yes, Mr. Mitchell and I went back there and reported to Mr. Bower. Then he said, "Thank you, gentlemen. I will handle it from now on." Mr. Mitchell and I heard nothing about it until we were notified eventually that it would come to court.

Mr. Wheeler: No further questions.

Cross Examination

By Mr. Rolston:

Q. Mr. Erhart, at the time that you saw Mr. Ashby, in the latter part of November, is it not a fact that you told him that this 90 pounds was a final adjustment?

A. I may have made that clear at the time; I did make it clear, I believe, that it was a final adjustment by me. [141] That was my intention.

Q. At the time you saw Mr. Ashby, at that time he said, "We can't use that fudge. We stopped payment on our invoice to Bower. We are going to cancel the order", did he not?

A. He did not say to me that. I assume he had

(Testimony of Alphonse Erhart.)
previously stated that, or we would not have been over there.

Q. When you left, was there any statement made during the conversation by you, "Use it as much as you can and I will adjust it later on"?

A. I do not recall that.

Q. Did you make any statement to that effect?

A. Did I?

Q. Yes.

A. Of course not.

Q. As a matter of fact, before you went to the stockroom did not Mr. Ashby say something to the effect that the girls didn't like to cut this fudge, and he was having a lot of trouble moving it?

A. Yes, he remarked that the fudge was hard to handle; to cut the fudge and handle it, was hard.

Q. Didn't he lay a portion of the blame upon the fact that he had new help, green girls, who did not like to get their hands messy?

A. Everyone knows they have green help at Christmas. [142]

The Court: That was not the question.

A. I don't recall distinctly the conversation. It seems familiar. I recall his remarking he hoped it dried off better, because the girls did kick about handling it from being sticky; but we recommended leaving it dry off, and finally that would be overcome.

Q. By Mr. Rolston. As a matter of fact, at the time of the original sale, back in October, around

(Testimony of Alphonse Erhart.)

the 20th, when Mr. Ashby ordered the fudge, didn't it stick to the knife?

A. It all depends upon the way you cut it. I recall stating that the knife should be moistened once in a while in cutting fudge; everyone does, in cutting a large block of fudge, an inch and a half thick, otherwise it will stick. He was cutting it with a penknife, so it stuck to the penknife.

Q. Did you see any fudge manufactured in Chicago during November?

A. You mean manufactured for Mr. Bower?

Q. Yes.

A. I did not see it. Mr. Mitchell was there for that purpose.

Q. Did you see the sample expressed out?

A. No.

Q. You did not see any merchandise at any time? [143]

A. No, because we had made arrangements, and Mitchell was to be there for that very purpose.

Q. You were in Chicago, and you did not check it?

A. I was in and out of Chicago. Mitchell was there all the time.

Q. As a matter of fact, when you came into Mr. Ashby's office some time in the early part of January Ashby's first statement was to the effect "Well, I am having trouble with the fudge again", is that right?

A. Something of the general order.

Q. Didn't you, during that conversation, say,

(Testimony of Alphonse Erhart.)

"Mr. Ashby, it looks as if you over bought a little, and are trying to crawl out of the deal"?

A. I am afraid I did not say that, because that would be rather rude to say to a buyer as powerful and big as Sears, Roebuck. What I thought might be another matter, but I am quite certain I did not say that when I went into the stockroom.

Q. Did any of the cases appear to have been opened?

A. There were one or two there open.

Q. One or two?

A. As we walked in there was a bench, and one or two were lying on the bench; others were nicely stacked; some on the bench and some up on the wall.

Q. How high were they stacked? [144]

A. None was stacked any too high. That was one thing Mr. Mitchell and I watched about.

Q. Were you in the Soto Street warehouse at that time?

A. In the large Sears, Roebuck building, on East Olympic, and the warehouse that they have is about 100, maybe 150 feet, and Mr. Ashby's office is on the same floor, in the middle of the building.

Q. Did you happen to notice any odor of fur or moths at that time? A. No.

Q. Isn't it a fact on that January occasion you actually opened about five or six cases: not ten or fifteen?

(Testimony of Alphonse Erhart.)

A. Say five to ten. I think we opened more than five, because we opened quite a few on one side, and then we went around to the other side. We did find a few cases that had a few good slabs.

Q. Isn't it a fact that quite a bit was saleable; not prime merchandise?

A. I think 70 or 75 per cent that we looked at was not; there was about 25 per cent that was good; I mean could be sold at a good price.

Q. You were up to my office in Hollywood, were you not? A. That's right.

Q. That was about four months ago?

A. Was it? [145]

Q. About that. September or October of last year. A. Yes.

Q. Isn't it a fact at that time that you told me you opened five or six cases, and some were dry, but not as dry as others, but still saleable; but not as prime merchandise; that it must be cleared out in a hurry, or there would be a terrific loss? That was said during the conference in the early part of January?

Q. It is possible, because it was my impression that the sale of the merchandise must be immediately, to overcome any further loss.

Q. At that time you told me some of the merchandise was still saleable?

A. I don't recall. You must be mistaken on that, because the facts are in fact the other way.

Q. Did you tell me at that time that you told Mr. Ashby that during the conference that you

(Testimony of Alphonse Erhart.)

intimated to Mr. Ashby that he had over bought his product, and this merchandise was still saleable?

A. Did I tell you that? Did I give you that impression?

Q. That's right.

A. I doubt if I told Mr. Ashby that. I may have told you, and gave you that impression.

Q. You did not tell me that you told Mr. Ashby that? [146] A. No.

The Court: That isn't important. In other words, it is one thing for you to have told Mr. Ashby, when he was complaining about the merchandise, that he may have over bought, and another thing that you may have thought he over bought. What you thought is not important.

A. I don't recall telling him that. I seriously question that I ever told Mr. Ashby in person that.

The Court: But you admit your conclusion at that examination that probably 70 per cent of the merchandise was not merchantable any longer?

A. That is my opinion.

Q. By Mr. Rolston: You don't know how that merchandise was stored during that period of time?

A. No, only what I observed at the time. I don't believe anywhere near all of the merchandise could have been in that stockroom.

Q. How many cases were there?

A. I would say maybe 100 cases, guessing at it.

(Testimony of Alphonse Erhart.)

The Court: What would the average case weigh?

A. I think they were 9-pound slabs. It would be where we could see it. We could see possibly two to three thousand pounds. We gave it a pretty thorough inspection. I judge, from the way it ran there, that the rest of the merchandise might run about the same. [147]

Q. By Mr. Rolston: As a matter of fact there are only two slabs to a case, are there not?

A. We are now packing them three; so I imagine at that time there were two, probably.

Q. There were two at that time?

A. I can't remember distinctly. There were two large wide ones. We are making them less wide now.

Q. Coming back to the discussion in my office, isn't it a fact that I asked you at that time, and read from a letter of Mr. Ashby's, and I asked you words to this effect: "Mr. Erhart, did you say at that time: 'Mr. Ashby, in most cases I will argue with the buyer, but here the buyer has a real kick coming' "; and at that time you denied you said anything of that nature?

A. I still deny it.

Q. Isn't it true I asked you at that time whether or not Mr. Mitchell said, "I would not have believed it possible if I had not seen it with my own eyes", and at that time you said Mitchell had not said anything like that?

A. I don't recall saying so.

(Testimony of Alphonse Erhart.)

Q. On that occasion, in my office, I asked you whether or not you made the following statement: "Bower will have to see this, because he will have to stand at least part of the loss"? And you said to me at that time. "I said no such thing"? [148]

A. I recall stating to Mr. Ashby, in the presence of Mr. Mitchell, that Mr. Bower would have to see this. I don't recall stating anything about Bower having to stand part of the loss. I could gain nothing by getting my neck in a sling, and making that remark.

Mr. Wheeler: Your observation was limited to the condition in which you found the merchandise; not who should stand the loss?

A. That is a fact. I was protecting Alphonse's skin then.

Q. By Mr. Rolston: And you are still doing it now? A. Yes, the best I can.

Mr. Rolston: Nothing further.

(Whereupon an adjournment was taken until 10 o'clock a.m. of the following day, Wednesday, January 10, 1945.) [149]

Los Angeles, California,

Wednesday, January 10, 1945, 10 a. m.

MARIE V. PELSTER,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Please state your name.

The Witness: Marie V. Pelster.

Direct Examination

By Mr. Wheeler:

Q. Mrs. Pelster, you are a resident of Los Angeles, are you? A. Yes, sir, I am.

Q. You have been for some years?

A. Yes.

Q. During the period from October, 1943 through February, 1944 what was your employment?

A. I was the division head of the 9th Street store.

Q. Division head of what department?

A. The candy department of the 9th Street store.

Q. How long had you been in the candy department in the 9th Street store?

A. From the 8th of May, 1943.

Q. Of 1943? A. Yes.

Q. Had you had any prior experience? [150]

A. In the candy department?

Q. In the candy department? A. No, sir.

(Testimony of Marie V. Pelster.)

Q. You are no longer employed by Sears, Roebuck and Company? A. No, sir.

Q. As a matter of fact, you are taking care of a baby, is that correct? A. Yes, sir.

Q. Calling your attention to fudge known as Pan O' Butter Fudge, do you recall having that candy in your division? A. Yes, sir.

Q. During that period of time?

A. Yes, sir.

Mr. Wheeler: I will mark this for identification.

The Clerk: Defendant's Exhibit I for identification. What is this?

Mr. Wheeler: It is a retail requisition, dated 11/15/43, No. 130341. I next offer for identification retail requisition, Return Merchandise. It is dated January 22, 1944, No. 273997.

The Clerk: J for identification.

Mr. Wheeler: And the next one is a mark-down form dated 1/6/44. No. 300839. [151]

The Clerk: K for identification.

Q. By Mr. Wheeler: Showing you Defendant's Exhibit I for identification, I will ask you if you recognize that exhibit. A. Yes, sir, I do.

Q. What is it, Mrs. Pelster?

A. What do you mean? It's pecan chocolate fudge. Is that what you mean?

Q. Yes. Does it show the quantity of fudge received by you at your store? A. Yes, sir.

Q. What was the quantity?

A. 5328 pounds.

(Testimony of Marie V. Pelster.)

Q. This is a record that was kept under your supervision or direction?

A. Yes; my signature is on it.

Q. What date does it reflect as to the receipt of the candy in your store?

A. What day did I receive it?

Q. Yes.

A. I received it the 26th of November, 1943.

Q. That was stamped?

A. It is stamped 26, 43.

Q. I show you Defendant's Exhibit J for identification, and I will ask you if you recognize that exhibit? [152] A. Yes, I do.

Q. What does that exhibit reflect?

A. That is R.M.R.; what we call return of merchandise to the L. A. pool. We sent it to the L. A. pool.

Q. When you say "L. A. pool", you mean the L. A. pool stock warehouse? A. Yes.

Q. What amount does it show was returned?

A. 2943 pounds.

Q. Does it reflect the date on which it was returned, the candy?

A. I returned it—I made it out the 22nd of January, 1944.

Q. Showing you Defendant's Exhibit K for identification, I will ask you if you recognize that?

A. Yes, I do.

Q. Is that a record that was kept under your supervision?

(Testimony of Marie V. Pelster.)

A. It had to go through my hands; it had to be signed by me.

Q. What does that reflect with reference to Pan O' Butter Fudge?

A. We took a knock-down.

Q. From what price?

A. From 89c to 69c. [153]

Q. Does it reflect the quantity of fudge on which you took a knock-down? A. Yes.

Q. What was the quantity?

A. 4300 pounds.

Q. And the date?

A. It was signed by me January 6, 1944.

Q. That was the date on which you took the knock-down? A. Yes.

Q. Mrs. Pelster, do you recall the condition of the fudge, of this Pan O' Butter Fudge?

A. Yes.

Q. When did you first make an examination of the fudge, or any part of it, with reference to the date that you received it?

A. It was the next day after we received it. We went through the fudge, and looked at it. We found it in terrible condition.

Mr. Rolston: I move to strike out the last of the answer.

The Court: Strike it out. Describe the condition.

A. We found it in a moldy condition, and we also found it in a very soft condition, kind of

(Testimony of Marie V. Pelster.)
runny, and we also found it in a very hard condition.

Q. With reference to the runny fudge, can you describe [154] more fully what you mean by "runny"?

A. Just mushy. We couldn't cut it.

Q. If you attempted to cut it, it would run together? A. Yes.

Mr. Rolston: I am going to object to that as leading. She can describe it, with no coaching from counsel.

The Court: All right.

Q. By Mr. Wheeler: What happened when you tried to cut it?

A. It just stuck to the knife; we just couldn't cut it. That was all; it just wouldn't cut.

Q. With reference to the hard candy, what was its appearance? A. The hardest candy?

Q. Yes.

A. It was so hard we just couldn't cut it; that's all.

Q. With reference to its color?

A. It was moldy; it was white on top.

Q. With reference to the condition that you described as being moldy, where did the mold appear?

A. Well, around the nuts, and mostly right in the center part.

Q. Did you sell any part of the fudge that you received? A. Yes, we did.

Q. What part of it did you sell? [155]

(Testimony of Marie V. Pelster.)

A. We sold the good. We sorted it, and sold what was salable.

Mr. Rolston: I move to strike that portion "which was salable" as a conclusion of the witness.

The Court: All right. It may be stricken.

Q. By Mr. Wheeler: When you say "salable", what do you mean? Describe the fudge; that was in a condition that you say was salable.

A. It could be cut, and was in a creamy form. It was very easy to cut, and creamy, and easy to stack. It would not run together.

Q. Where was the candy stored?

A. In our storeroom.

Q. Where was the storeroom located?

A. Located on the second floor.

Q. In what part of the building?

A. About the center.

Q. Was it a part of the storage portion of the building?

A. That is the stockroom where we keep all our merchandise.

Q. Is the candy stored in a separate storeroom?

A. Yes, sir.

Q. Was it near, or does the candy stockroom open directly into the office space or office area on the second floor? [156]

A. No. It is all stockroom. Ours is all fenced off. The candy department is fenced off.

Q. What is the condition of the stockroom with reference to temperature?

(Testimony of Marie V. Pelster.)

A. It's cool; it's never been warm, and it has a circulating system.

Q. Is it lighted? A. Not that I know of.

Q. In January, when you took the mark-down on the candy, did you make a further examination of the fudge? A. Yes, sir, we examined it.

Q. What was the condition of the fudge at that time?

A. Well, some of it, like I tell you; we put some aside that could not be sold, because it was too moldy and too hard, and we just took the best part and took the mark-down on part of it.

Q. Then when you returned a part of the candy to the pool stock did you make any fruther examination of the fudge? A. Yes, we did.

Q. What was the condition of the fudge that was returned to the pool stock?

A. Well, it was in the same condition; it was moldy, hard, and also that runny condition.

Q. Did you make any effort to dry the candy which was soft? [157] A. Yes, we did.

Q. Do you recall when you made that?

A. We did that the first time we opened it up and found one of the soft ones; we went and dried it out.

Q. Were you able to dry all of the fudge?

A. No, sir.

Q. By drying, what did you do?

A. We left it open under a light, you know, just open, with the waxed paper so that anything

(Testimony of Marie V. Pelster.)
wouldn't get on it. We tried to dry it out that way, but it didn't work.

Q. In other words, you exposed it to the air?

A. Yes, sir.

Q. How many employees did you have in the candy department during the Christmas period?

A. In 1943 I had 34 employees.

Q. What was the number that you normally had? A. After Christmas I had 14.

Q. Did you have any other fudge stored in the stockroom at that time?

A. I don't remember.

Mr. Wheeler: You may examine.

Cross Examination

By Mr. Rolston:

Q. Have you ever handled any other fudge?

A. Yes, we did. [158]

Q. When was that?

A. I can't give you the date. I don't know just when.

Q. Was it before or after the Pan O' Butter Fudge?

A. We handle another fudge. All the year round we get fudge.

Q. How often do your girls normally turn over, your employees? A. What do you mean?

Q. How long do they remain on the job?

A. The 14 I had when I was there; that was about eight months. Christmastime we had just extra girls.

(Testimony of Marie V. Pelster.)

Q. When did you sever your relationship with Sears, Roebuck?

A. On the 19th of August, 1944.

Q. Do I understand you correctly to state upon that first examination of the fudge you found these various conditions: Moldy, softness, runny, as well as hardness? A. Yes, sir.

Q. Some of the fudge was that way at the very beginning? A. Yes, sir.

Q. Did you report it to Mr. Ashby?

A. Yes, sir.

Q. Did he instruct you to attempt to dry it out?

A. Yes, sir. [159]

Q. Did any of the fudge dry out so that you could use any of the runny fudge? A. No.

Q. None of it? A. No.

Q. How many cases did you open?

A. I can't remember that; that's been too long.

Q. Do you remember whether you opened all of them?

A. Not at first, we did not, no, but I know when we sent it back we did; we opened each one.

Q. You opened each one? A. Yes.

Q. At that time you still found some runny?

A. Yes, and we found two slabs in a case, that would be sticking together.

Q. What is the size of your stockroom?

A. I couldn't tell you that. I don't remember.

Q. You don't remember the size of the stockroom you put the candy in?

A. I don't remember exactly.

(Testimony of Marie V. Pelster.)

Q. I don't expect you to be exact. An approximation.

A. I couldn't tell you. I don't know.

Q. Do you have shelves?

A. Yes, we had shelves; lots of them.

Q. How high would the candy be stacked? [160]

A. About five slabs.

Q. On any occasion ten slabs? A. No.

Q. On any occasion two slabs?

A. Sometimes two, yes.

Q. But not over five? A. No.

Q. You recall that distinctly? A. Yes.

Q. You never stacked it up to your shoulders from the floor? A. No.

Q. None that you know of?

A. Not that I know of.

Q. Did this stockroom have any windows on the outside?

A. No, I don't think so. It has a circulating system, air-conditioned.

Q. You don't know whether it has any windows, however? A. I don't remember.

Q. Do you recall whether or not, when you say "fenced off", whether it was lattice work?

A. It's a regular fence.

Q. A lattice fence? A. Yes.

Q. It isn't a solid wall? [161]

A. No, it is a fence, a regular fence.

Q. Did you have any trouble with new girls and their dislike of handling this fudge?

A. Yes, I did.

(Testimony of Marie V. Pelster.)

Q. Did you report that to Mr. Ashby?

A. Yes, he knows that, because he was there when we were cutting it. They did not like it.

Q. They did not like to handle it because it was messy, and made their hands messy?

A. Yes.

Q. I call your attention to Defendant's Exhibit K for identification; that is, the mark-down order. I see it called for a mark-down of 4300 pounds. Is that your recollection of how much there was?

A. Yes.

Q. You examined that 4300 pounds at that time?

A. Yes.

Q. That was merchandise you felt was still salable? A. Yes.

Q. That was 4300 pounds?

A. Yes, that is what we looked at, and we thought we could sell it for that price for 69c.

Mr. Rolston: That is all. [162]

Redirect Examination

By Mr. Wheeler:

Q. Mrs. Pelster, did you have any complaint as to the handling of the fudge from the old girls, or your steady girls as well?

A. Yes, I did have a lot of complaints from my older girls. They did not like to handle it, either.

Q. With reference to this other fudge that you had in the storeroom, did you ever have any of that fudge mold?

(Testimony of Marie V. Pelster.)

Mr. Rolston: To which we are going to object as outside the issues of the case.

The Court: I will sustain the objection.

Q. By Mr. Wheeler: Now, Mrs. Pelster, with reference to the mark-down figure on the 4300 pounds, is it not a fact that that was the total stock you had in the store at the time?

Mr. Rolson: Just a minute. I am going to object to that. He is cross-examining his own witness.

The Court: That is permissible, in view of the questions you have asked in your cross examination. He can ask leading questions on redirect.

A. You know, I just can't remember everything. That is a long time to remember just exactly what we had in stock.

Q. By Mr. Wheeler: Isn't it a fact that you took the mark-down on the total stock that you had in the store? [163] A. Yes.

Mr. Rolston: I am going to object to that; and move that the answer be stricken upon the ground that she has already testified that she can't remember.

The Court: You can ask a witness, after she has made a statement about the 4300 pounds, to explain, to see whether she stand by the statement or not.

Mr. Wheeler: No further questions.

The Court: Call your next witness.

ELIZABETH H. BESCH,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: State your anme, please.

The Witness: Elizabeth H. Besch.

Direct Examination

By Mr. Wheeler:

Q. Did you bring records with you?

A. Yes, I did.

Mr. Wheeler: This will be the first one, which will be the retail requisition, dated 11/15/43, No. 130342.

The Clerk: L for identification.

Mr. Wheeler: The next will be the retail requisition dated 1/25/44, and it is No. 888279. [164]

The Clerk: M for identification.

Mr. Wheeler: This will be a mark-down form, dated 1/15/44, No. 292442.

The Clerk: N for identification.

Mr. Wheeler: And a mark-down form 292444, dated 1/15/44.

The Clerk: O for identification.

Q. By Mr. Wheeler: Mrs. Besch, you are a resident of Los Angeles? A. Yes, I am.

Q. You are employed by Sears, Roebuck and Company, are you? A. Yes, I am.

Q. For what period of time have you been employed by Sears, Roebuck and Company?

A. About six years.

Q. What is your present employment?

(Testimony of Elizabeth H. Besch.)

A. I work in the candy department. I am division manager.

Q. In what store?

A. Vermont and Slauson.

Q. How long have you been employed as division manager in the candy department?

A. Two years; as the division manager last November.

Q. What was your employment prior to that?

A. I worked in the candy department, and I worked as an extra.

Q. For what period of time?

A. Well, I would say for about three years.

Q. Showing you Defendant's Exhibit L for identification, I will ask you if you can identify that exhibit. A. Yes, I can.

Q. What is it?

A. Well, that is the chocolate fudge we received.

Q. That is the requisition that covers the chocolate fudge that you received? A. Yes.

Q. That was the Pan O' Butter Fudge?

A. That's right.

Q. That is a record that was prepared by you?

A. Well, this was made out by Mr. Ashby.

Q. It has been kept under your supervision?

A. That's right.

Q. What does it reflect?

A. Well, it shows that we received 5040 pounds of chocolate pecan fudge.

Q. Does that reflect the date on which you received it? A. Yes, it does.

(Testimony of Elizabeth H. Besch.)

Q. What is that date?

A. December 6, 1943. [166]

Q. I show you Defendant's Exhibit M for identification, and ask you if you recognize that.

A. Yes, I do.

Q. What is it?

A. That is the R. M. R. on the pecan fudge.

Q. When you say "R. M. R.", what do you mean?

A. That means the merchandise has gone back to the pool stock.

Q. To the central warehouse? A. Yes.

Q. Does it reflect the quantity of fudge sent back? A. Yes, it does, 1566 pounds.

Q. Does it reflect the date on which the candy was shipped?

A. It says here on the 25th of January, 1944.

Q. Showing you the mark-down forms, Defendant's Exhibit N and O for identification, I will ask you if you recognize those records.

A. Yes, I do.

Q. What do they reflect with reference to the Pan O' Butter Fudge?

A. It is the mark-down on that Pan O' Butter Fudge; both of these.

Q. They were made by you at the time that you took the mark-down? [167]

A. They were made by me.

Q. What dates do they reflect that you took the mark-down?

(Testimony of Elizabeth H. Besch.)

A. One is on January 15, 1944; in fact, both of them are.

Q. Calling your attention to this Pan O' Butter Fudge, Mrs. Besch, do you recall receiving it in the store? A. Yes, I do.

Q. When did you make your first examination of any part of the fudge with reference to the date of its receipt?

A. Well, we examined it the very day that we received it.

Q. Did you examine any quantity of it, and what was its condition?

A. We opened about, I would say, maybe 15 boxes, and part of it was moldy.

Q. What was the condition of the part that was not moldy?

A. It was very soft and runny.

Q. Did you make any effort to cut the candy?

A. Yes, we did.

Q. What happened when you endeavored to cut it?

A. We stopped. We couldn't cut it. The knife just stick to it, and it was impossible to cut it.

Q. Was there some portion of the candy that could be [168] used?

A. Yes, there was part of the candy that could be used.

Q. What was the condition of the candy that could be used?

A. It was creamy and kind of firm; was easy to cut.

(Testimony of Elizabeth H. Besch.)

Q. Did you make any effort of drying the candy that was soft? A. Yes, we did.

Q. What was your experience with reference to drying the soft candy?

A. It just wouldn't dry.

Q. What did you do in drying it?

A. We took the lids off and paper, and set the open boxes on the shelves, exposing it to the air.

Q. Did you make any further examination of the candy? Well, did you make a complete examination of all of the candy? A. Yes, I did.

Q. At what time did you make that examination?

A. Oh, a few days after we received the merchandise.

Q. What was the condition of all of the merchandise? I mean, what did your examination of all of the merchandise disclose?

A. Well, part of it was very bad; it was moldy; and part of it was very soft and part of it was in a salable condition, I mean, a good condition.

Q. What did you do with that which was moldy?

A. I just set it aside.

Q. Did you sell any of the candy?

A. Not of the moldy candy, I did not.

Q. Did you sell any part of the total shipment?

A. Yes, I did.

Q. Did you make a further examination of the candy at the time you took a mark-down?

A. Yes, I did.

Q. Did you find any more of the candy that was

(Testimony of Elizabeth H. Besch.)

moldy than had been moldy at the time of your first examination? A. No, I didn't.

Q. Did you make any further examination of the candy at the time that you returned the merchandise to the pool stock? A. Yes, I did.

Q. What was the condition of the candy which you returned to the pool stock?

A. Well, it was moldy and very dry.

Q. When you say it was very dry, just what do you mean?

A. I mean that you just couldn't cut it; it was so hard we just couldn't get a knife through it.

Q. What was its condition with reference to appearance?

A. It was kind of grayish-looking.

Q. Was any of the hard candy or dry candy molded? [170] A. Yes, it was.

Q. Where did the mold appear?

A. Well, under the nuts and in the center; more in the center of the slab of fudge.

Q. How many girls did you have in the candy department during that period, Mrs. Besch?

A. Well, I can't say exactly, but I believe it was about 40.

Q. That was during the Christmas period?

A. That's right.

Q. How many girls do you have normally?

A. About 12.

Mr. Wheeler: I have no further questions.

(Testimony of Elizabeth H. Besch.)

Cross Examination

By Mr. Rolston:

Q. Mrs. Besch, referring to Exhibit N for identification, does that represent all the fudge that you had on hand as of that day? A. Yes, it does.

Q. Had you previously sold all of the marked-down merchandise? A. Yes, we had.

Q. Did you have any difficulty with your girls regarding the selling of this pecan fudge?

A. Yes, I did. [171]

Q. They did not like to handle it?

A. They did not like to handle it, because they couldn't get it out of the pan.

Q. When you say you made a complete examination, do you mean you opened each and every case?

A. That's right.

Q. You know there were some 280 cases?

A. Yes, I remember that.

Q. You opened each and every one of them?

A. Yes, with the exception of what we had out on the floor that was cut.

Q. Did you look at the bottom layer as well as the top layer? A. Yes, we did.

Q. You took out the top layer? A. Yes.

Q. Did you, yourself?

A. My assistant and my stock boy helped me.

Q. How long did that examination take?

A. It took every bit of three hours.

Q. Did you advise Mr. Ashby of the result of your examination? A. Yes, I did.

Q. Did he come over and look at it?

(Testimony of Elizabeth H. Besch.)

A. Yes, he did. [172]

Q. You say none of the cases that you opened and tried to dry dried sufficiently to be used?

A. No, they did not.

Q. None of them? A. No.

Q. If I recall correctly, your second examination was at the time of the mark-down?

A. That's right.

Q. Did you count the number of cases that you found in a moldy condition at the time of your first examination? A. Yes, I did.

Q. Did you make a record of the number of cases?

A. No, I made a record of how many pounds we had; not of the cases.

Q. Did you make a record of how many cases that were soft? A. I did not.

Q. Did you make a record of how many cases that were good, and could be used?

A. No, I did not.

Q. Did you make a record of the poundage?

A. No, I did not, except the moldy fudge.

Q. You just made a record of that?

A. That's right.

Q. Do you still have that record? [173]

A. I couldn't say. I don't believe so.

Q. You don't believe so? A. No.

Mr. Rolston: That is all.

Mr. Wheeler: I have no further questions.

The Court: Call your next witness.

Mr. Wheeler: Mrs. Benson.

BARBARA BENSON,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: What is your name?

The Witness: Barbara Benson.

Direct Examination

By Mr. Wheeler:

Q. I offer retail requisition No. 130344, dated 11/15/43.

The Clerk: P for identification.

Mr. Wheeler: Retail requisition No. 341876, dated 1/25/44.

The Clerk: Q for identification.

Mr. Wheeler: Mark-down form No. 147925, dated 12/30/43.

The Clerk: R for identification.

Mr. Wheeler: Mark-down form dated 1/22/44, No. 300401. [174]

The Clerk: S for identification.

Q. By Mr. Wheeler: Mrs. Benson, are you a resident of the City of Long Beach?

A. Yes, sir.

Q. You are employed in the Long Beach store of Sears, Roebuck and Company?

A. Yes, sir.

Q. How long have you been so employed?

A. Well, I have been with Sears, Roebuck almost four years.

Q. And you are presently employed as division manager of the candy department of the Long Beach store? A. That's right.

(Testimony of Barbara Benson.)

Q. How long have you been employed in the candy division?

A. Two years ago last September.

Q. So you were employed as division manager during the period from October, 1943 to February, 1944? A. Yes, sir.

Q. I call your attention to certain chocolate pecan fudge known as Pan O' Butter Fudge. Do you recall that fudge? A. Yes, I do.

Q. Did you have it in your store during the period from October, 1943 through February, 1944?

A. Yes, we did.

Q. I show you Defendant's Exhibit R for identification and I will ask you if that is a company record, and if it came from your control, Mrs. Benson?

A. Yes, sir, this accompanies the merchandise into our store from the pool stock.

Q. You got that requisition at the time you received the Pan O' Butter Fudge?

A. Yes, sir.

Q. Did you make a check of the Pan O' Butter Fudge that you received, against that record?

A. Yes, I did.

Q. What does that record reflect with reference to the quantity of merchandise that you received in the Store?

A. You mean does this quantity check with what we received?

Q. Yes. A. Yes, it does.

Q. What was the quantity that you received?

(Testimony of Barbara Benson.)

A. On this one, 4474, that I received as an inter-store transfer from the Pico store.

The Clerk: Counsel has handed me a document which I have marked T for identification.

Q. By Mr. Wheeler: And it is a retail requisition No. 83091, dated 1/17/44. [176]

Mr. Rolston: May I see that, counsel?

Q. By Mr. Wheeler: I will ask you, showing you Defendant's Exhibit T for identification, if that is a record that accompanied the fudge that was transferred from the Pico store?

A. Yes, it is.

Q. Does that record reflect the quantity of fudge you received from the Pico store?

A. Yes, sir.

Q. What was the quantity?

A. 504 pounds.

Q. With reference to the original shipment, on what date did you receive the 4000 and some pounds? A. November 23rd.

Q. With reference to the 500-odd pounds that you received from the Pico store, what date did you receive that?

A. I received—I don't see the receiving date on this, but it was shipped from the Pico store on the 18th of January.

Q. Apparently, according to the copies I will show you, that does bear the shipping date.

A. We received it on the 24th of January—no, sir, that isn't right, either; I am sorry. This is a copy of what we sent back to our pool stock. That was the moldy fudge. [177]

(Testimony of Barbara Benson.)

Q. I am sorry; I handed you the wrong record.

A. The date that we received this inter-store transfer from Pico was January 20th.

Q. 1944? A. Yes, sir.

Q. I show you Defendant's Exhibit No. R for identification, and I will ask you if that record was under your supervision and control?

A. This record was not written by me, but I knew it was written.

Q. It was written under your direction, was it?

A. Yes, sir.

Q. It has been maintained in your department?

A. Yes, sir.

Q. What does it reflect, Mrs. Benson?

A. This was after Christmas, and we had to take a mark-down from 89c to 69c so we could get rid of the candy that was salable.

Q. So you took that mark-down? Does that reflect the number of pounds?

A. It isn't the total number of pounds. We took part of it to get it into this period. Then we took part of it for the next period.

Q. Showing you Defendant's Exhibit S for identification, I will ask you if that is a record which you made? [178]

A. Yes, sir, I did. The total of these two is the entire mark-down that I took, from 89c to 69c.

Q. That relates to this Pan O' Butter Fudge?

A. Yes, sir.

Q. The first date that you took the mark-down was what? A. It was on December 30, 1943.

(Testimony of Barbara Benson.)

Q. And you took the balance of the mark-down—

A. January 22, 1944.

Q. I show you Defendant's Exhibit Q for identification, and I will ask you if this is a record which you kept under your supervision?

A. Yes, this is, by our Los Angeles warehouse, 144 pounds of fudge.

Q. What does it mean by R.M.R.?

A. That is the paper we make out when we send our merchandise back to our Los Angeles pool stock.

Q. Did you check the merchandise?

A. Yes, I did.

Q. What was the quantity returned?

A. 144 pounds.

Q. What date did you return it?

A. January 24, 1944.

Q. Did you make any examination of this Pan O' Butter Fudge at or about the time you received [179] it? A. Yes, I did.

Q. What did your examination disclose?

A. Well, I did not have to go on the inside of the box to know there was something wrong, because it was leaking all over the floor of the warehouse. It was quite runny. Then I had my stock man help me open boxes, and it was very soft.

Q. Did you make a complete examination of the candy at the time? A. Yes, sir.

Q. Did you make any further examination of the candy at a later date?

A. Yes, I did, when I took my mark-down, to

(Testimony of Barbara Benson.)

see how much I had left. Then I examined it again when I sent it back to the Los Angeles pool stock.

Q. At the time that you sent the candy back to the Los Angeles pool stock what was the condition of the fudge that you returned or sent back?

A. It was moldy, and some of it was fermented, it was so soft. I guess they didn't cook it enough.

Mr. Rolston: I move to strike that out.

The Court: Strike it.

A. It had a bad odor, and was very soft and bubbly; some of it was entirely different; it was hard and moldy.

Q. By Mr. Wheeler: Did you make any examination of [180] the fudge that you received from the Pico store?

A. I did. When I talked to the division head at the time, I told her——

Mr. Rolston: I object to any conversation.

The Court: You can tell only about the condition of the fudge that you received from the store; not what she told you.

A. It was all right. It was in salable condition.

Q. By salable condition, what do you mean?

A. It was not fermented. It was not moldy, and we could cut it.

Q. How many girls did you have in the candy department during that period of time?

A. Well, before Christmas we had about 30. After Christmas I think it was about 11.

Q. Do you recall when you finally disposed of all of the candy?

(Testimony of Barbara Benson.)

A. Well, I disposed of the last of it when I sent the 144 pounds back to the Los Angeles pool stock.

Mr. Wheeler: I have no further questions.

The Court: How much did you sell after the mark-down, do you remember?

A. Altogether I marked down about 1600 pounds, and then take away 144 pounds from 1600 pounds; that's what I sold [181]

Cross Examination

By Mr. Rolston:

Q. Calling your attention to this figure you just gave the court, will you look at Exhibit S for identification? Is that 48 pounds; not 480 pounds?

A. No, sir, it is not 48. You examine it a little closer and you will see it is 487. I can see now how you could mistake that for 48 pounds, because it looks like the 7 was a pound symbol.

Q. You only took a mark-down of 20c?

A. At that time, yes.

Q. The price $9.60 reflects only 48 pounds' mark-down?

A. That was an error in our accounting department. I don't see these things after I turn them in to the auditor. Would you like to see it, sir?

The Court: Yes, I had better see it. When I looked at the 7 I thought it was a pound mark.

A. Yes; it is really plain when you study it a little bit.

Mr. Rolston: You are only charged $9.60.

A. Yes, and that made my inventory short.

(Testimony of Barbara Benson.)

The Court: You got into more trouble?

A. That's right.

Q. By Mr. Rolston: In fact, you had trouble with the girls on this fudge? [182]

A. Yes.

Q. They did not like to handle it?

A. No, sir.

Q. Did I understand you correctly to say that you sold all of the fudge that came from Pico?

A. Yes, I did, that had been inspected.

Q. You had not inspected it, though?

A. I inspected it, yes, sir.

Q. All of that was sold at the mark-down price?

A. Yes, it was marked down before it came in to me.

Q. Except for the 144 pounds that was returned to the pool you sold all of the fudge that was assigned to you, as well as the Pico, is that right?

A. Yes, sir.

Q. Mrs. Benson, is it not a fact, calling your attention to Exhibit R for identification, that that was all the fudge you had left on hand at the time you took that mark-down?

A. No, sir, that was not all the fudge we had left over. That was all that we took a mark-down on, on that part of the fudge.

Q. It is a matter of policy to take a mark-down on candy right after Christmas?

A. Yes, sir, it is. I was out ill for a week.

Mr. Rolston: That is all.

(Short recess.) [183]

OLIVER J. BEMIS,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Please state your name.

The Witness: Oliver J. Bemis.

Direct Examination

By Mr. Wheeler:

Mr. Wheeler: I will introduce first retail requisition dated 11/15/43, No. 130348.

The Clerk: U for identification.

Mr. Wheeler: The next is a retail requisition dated 1/17/44, No. 83091.

The Clerk: V for identification.

Mr. Wheeler: And a mark-down form No. 216543, dated 1/22/44.

The Clerk: W for identification.

Q. By Mr. Wheeler: Mr. Bemis, you are employed by Sears, Roebuck and Company in their Pico store?

A. Yes.

Q. You are employed as merchandise manager in that store? A. That is right.

Q. How long have you been so employed?

A. I have been with the company 15 years.

Q. How long have you been merchandise manager in the [184] Pico store? A. Three years.

Q. Will you describe briefly the functions of your office, your position?

A. Well, insofar as the candy department is concerned I supervise the ordering, the display of

(Testimony of Oliver J. Bemis.)

the merchandise, mark-ups, mark-downs, returns, and things of that nature.

Q. During the period from October, 1943, through February, 1944, who was the division manager in the candy department?

A. Miss Elma Shipley.

Q. Is she at present with the company?

A. No, she has severed her connections, to be married.

Q. Do you know where she is now?

A. Quantico, Virginia.

The Court: She is going to be be married to a sailor?

A. A marine captain.

Q. By Mr. Wheeler: I show you Defendant's Exhibit U for identification, Mr. Bemis, and I will ask you if that is a copy of a record which you maintained under your supervision?

A. Yes, that's the requisition that the merchandise came in on.

Q. And is a check made of the merchandise against the requisition, as it comes in the store?

A. Yes, it is checked in the marking room for quantity.

Q. If an amount different than that shown on the requisition is received, would there be a notation made?

A. There would be an irregularity made, yes.

Q. What does the record reflect with reference to the receipt of fudge?

(Testimony of Oliver J. Bemis.)

A. It reflects we received 4482 pounds on December 7th.

Q. 1943? A. 1943.

Q. I show you Defendant's Exhibit V for identification and I will ask you if that is a record which you maintained under your supervision?

A. Yes. This is a requisition, and that relates to the transfer of 504 pounds, to the Long Beach store on January 17, 1943.

Q. I show you Defendant's Exhibit W, and ask you if that is a record which is maintained under your supervision?

A. This is a mark-down that we took on January 22nd from 89c to 69c on the fudge.

Q. Do you recall the receipt of Pan O' Butter Fudge in the Pico store during the period from October, 1943, to February?

A. Yes, I recall it coming in. I recall the fudge coming in in December, 1943.

Q. Did you make an examination of the fudge that was [186] received?

A. Yes, I was called to the marking room when it came in, and examined some of it.

Q. Do you recall the condition of the fudge at the time you received it? A. Yes, I do.

Q. What was the condition of the fudge that you examined at the time?

A. It was quite soft.

Q. Was the fudge cut in your presence?

A. Yes, I watched the girls cut it on the tables.

(Testimony of Oliver J. Bemis.)

Q. What, if anything, did you observe with reference to cutting the fudge?

A. It was very difficult to cut.

Q. Did you make any further examinations of the candy at a later date?

A. Yes, I did. I noticed from time to time that some of it was very hard, and couldn't be cut, and had to be chopped.

Q. What, if anything, did you observe with reference to the appearance of this very hard candy?

A. Just very hard; that was all.

Q. With reference to color.

Mr. Rolston: I object to the leading questions, your Honor. [187]

The Court: I think the witness can describe the condition, having had experience as a merchandise man. Go ahead, and describe the condition.

A. It was brown color, and it was very hard, and chipped into very small pieces.

Q. By Mr. Wheeler: Did you make any further examination of the fudge?

A. Other of it was very soft, and very hard to do anything with. If I may explain, your Honor, after it was cut it was so soft, if you put it back it would just congeal into one mass.

Q. Do you know if any of the fudge was returned to the pool stock warehouse?

A. We returned in the neighborhood of 1600 pounds to the pool stock.

(Testimony of Oliver J. Bemis.)

Q. Did you make any examination or inspect any fudge that went back to the pool stock?

A. Our department manager and some of the stock boys opened every carton.

Q. By Mr. Rolston: Do you know that they opened them? Were you there?

A. Yes, I saw them opened.

Q. You watched them opened? A. Yes.

Mr. Rolston: Proceed.

A. That I observed or looked at was moldy. Mold had [188] formed.

Q. By Mr. Wheeler: Do you know how long Miss Shipley had been with the company?

A. Five years.

Q. How long had she been head of the candy department? A. About two years.

Q. What experience had she had prior to that in candy?

A. She had had no experience in candy.

Q. Where was the stockroom in the Pico store, the candy stockroom?

A. Our stockroom was on the main floor, south end of the building, just off of the shipping dock.

Q. Was it directly connected with the selling area? A. No.

Q. Was it heated?

A. Not in any way, no.

Q. But you have a ventilating system?

A. Yes, a circulating system.

Q. Was the candy stockroom separate from the warehouse on the receiving dock area?

(Testimony of Oliver J. Bemis.)

A. Yes, partitioned off in an area of its own.

Q. What was the temperature, or what was the situation in the candy stockroom with reference to temperature?

A. It's probably a little cooler than room temperature, because it is right off our receiving and shipping area. [189] The doors are open; therefore, with the wire screen that marks it off, it is fairly cool, I would say.

Mr. Wheeler: I have no further questions.

Cross-Examination

By Mr. Rolston:

Q. Mr. Bemis, how many departments do you have under you as merchandise manager?

A. 24.

Q. Do you inspect all merchandise that comes in every department?

A. Not all of it, but I try to inspect part of it.

Q. Do you recall whether or not any attempt was made to dry out any of the fudge?

A. Yes, we received instructions from Mr. Ashby to that effect, and we did as instructed.

Q. Did you sell the fudge that was dried out?

A. Yes, where we could dry it out we sold it.

Q. Referring to Defendant's Exhibit W for identification, that is, the mark-down form, it is dated January 22nd. Was any mark-down made prior to that?

A. Yes, we marked a small amount down on the 11th of January.

(Testimony of Oliver J. Bemis.)

Q. Do you recall how much?

A. 100 and some pounds, I believe.

Q. Do you have any record of that? [190]

A. Yes.

Q. I mean the Pico store. Did you bring that record with you? A. Yes.

Mr. Rolston: Do you want to step down and help him, counsel, find it? I suppose you will want this marked.

Mr. Wheeler: Yes, if you will.

The Clerk: X for identification. It is No. 216539, mark-down form dated 1/11/44.

Q. By Mr. Wheeler: Referring to Defendant's Exhibit X for identification, that is the slip you are referring to? A. Yes.

Q. Was there any other mark-down made at any other time of this fudge?

A. Not that I recall.

Q. Was there any mark-down made, a special mark-down written out in connection with Defendant's Exhibit V for identification? That is the requisition sending 500 pounds to Long Beach.

A. As I recall it, this transfer to Long Beach was included in this mark-down.

Q. Of the later mark-down? A. Yes.

Q. In other words, at the time it was shipped you contemplated marking it down? [191]

A. We knew it was going to be marked down.

Q. When did you actually mark it down on the floor of the store?

A. The 22nd of January, I believe it was.

(Testimony of Oliver J. Bemis.)

Q. Didn't you mark it down on January 11th, as a matter of fact?

A. That was just the 136 pounds, but the big mark-down was taken on the 22nd.

Q. The 136 pounds were sold at the mark-down price? A. Yes.

Q. Was any of the fudge sold at the mark-down price from January 22nd?

A. That I don't recall.

Q. Did you report any of the situation to Mr. Ashby? A. Yes, we did.

Q. When did you first report to him?

A. We reported it early in December, 1943.

Q. Would it be on or before the 6th of December?

A. No, because we did not receive it until the 7th.

Q. Did you sell any of the hard fudge?

A. Yes, we did.

Q. Did you sell any of the moldy fudge?

A. No, sir.

Q. So far as you can recall there was no moldy fudge at the time it first came in, and your first examination? [192]

A. Our first examination, as I recall, did not reveal any moldy fudge.

Q. It was not until after the mark-down or the time of the shipment to Long Beach that any mold was noticed?

A. Will you read the question?

(Question read by the reporter.)

A. We discovered mold before then.

(Testimony of Oliver J. Bemis.)

Q. How long before, if you recall?

A. I would say three weeks.

Q. Around the first of the year?

A. Before that.

Q. If I understand your testimony, Mr. Bemis, you never fully examined each and every carton at all, did you?

A. No, I didn't personally.

Q. So you do not know the condition of all the fudge that was returned?

A. No, I am taking the word of the girl that supervised the department at that time; but I did examine at least a dozen cartons of it.

Q. As a matter of fact, Mr. Bemis, all of the fudge that was returned to the pool stock warehouse was all the fudge that you had left on hand, is that right? A. That is right.

Mr. Rolston: No further questions. [193]

Redirect Examination

By Mr. Wheeler:

Q. Mr. Bemis, in connection with the drying of the fudge, you did receive a bulletin from Mr. Ashby concerning that, did you?

A. The drying of the fudge, yes, we received a bulletin.

Mr. Wheeler: Bulletin A-167, dated November 29, 1943.

The Clerk: Y in evidence.

Mr. Rolston: I have no objection to it going into evidence.

The Court: I think all of the exhibits used to refresh the witnesses' recollection should all be offered.

Mr. Wheeler: Yes, I shall. You have no objection to these?

Mr. Rolston: No.

Mr. Wheeler: I have no further questions.

Q. By Mr. Rolston: After you received this you did dry out some of the fudge?

A. Yes.

Q. And you sold it as it dried out?

A. Some of it.

Mr. Rolston: That is all.

EVELYN VON KROG,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Please state your name.

The Witness: Evelyn Von Krog.

Direct Examination

By Mr. Wheeler:

Mr. Wheeler: I will offer retail requisition No. 53448, dated 1/21/44.

The Clerk: Z for identification.

Mr. Wheeler: And mark-down form No. 907115, dated 1/10/44.

The Clerk: AA for identification.

(Testimony of Evelyn Von Krog.)

Q. By Mr. Wheeler: Mrs. Von Krog, you are a resident of Los Angeles, are you?

A. Glendale.

Q. You are employed in the Glendale store of Sears, Roebuck and Company? A. Yes, sir.

Q. As the division manager of the candy department? A. Yes, sir.

Q. How long have you been employed as the division manager of the candy department?

A. Since December 10, 1941.

Q. Were you employed by the company prior to that time? [195]

A. Yes, for almost six months.

Q. In what capacity were you employed during that period?

A. Part of the time in the drug department, and part of the time in the ready-to-wear. That's in the marking room.

Q. Calling your attention to the period from October, 1943, to January 1, 1944, I will ask you if you recall the receipt of Pan O' Butter in the store?

A. Yes, sir.

Q. Do you recall the approximate date on which the fudge was received?

A. I believe it was somewhere in the middle of November.

Q. Do you recall the quantity of fudge that was received?

A. Somewhere around 2500 pounds.

Q. Did you make any examination of the fudge, or any part of it, at the time it was received?

(Testimony of Evelyn Von Krog.)

A. Part of it. We opened somewhere around, I would say, 1000 pounds.

Q. What did the examination that you made disclose with reference to the fudge?

A. Part of it was saleable; it was creamy and easily cut and part of it was moldy and part of it was runny. [196]

Q. Did you make any effort to cut the fudge which you describe as runny?

A. Yes, we did. It stuck to the knife, and wouldn't hold its shape in squares at all. It would run together on the pan.

Q. Did you receive any instructions from Mr. Ashby with reference to the drying of the fudge?

A. Yes, we did.

Q. I call your attention to Defendant's Exhibit Y, and I will ask you if that is similar to the copy which you received? A. Yes, it is.

Q. Did you make an effort to dry the fudge?

A. Part of it we did. We have a small stock-room on the main floor in which we keep all our candy stock, and we have a very little room in that, and we opened part of it and tried drying it. Some of it dried enough so we could cut it and use it, and some of it did not.

Q. Did you make any further examination of the candy prior to January 1, 1944?

A. No, not other than this amount we had worked with, this 1000 pounds which we had sold most of it by that time.

Q. On January 1st you became ill?

(Testimony of Evelyn Von Krog.)

A. I had pneumonia; from January 1st I was off until January 22nd. [197]

Q. I show you Defendant's Exhibit Z for identification. Was that record prepared by you?

A. No, it was not. I was back half days during this time, just prior to the inventory in order to help Miss Adamson, my assistant, out.

Q. So you didn't prepare the record?

A. No.

Q. Did you make any examination of the fudge subsequent to that return?

A. Yes, I looked over part of it.

Q. What did your examination at the time it was returned reflect?

A. I found that it was moldy around the nuts and fudge, and some of it was very runny and had run clear through the paper dividing the two slabs. Some of it was very hard, and we couldn't get the slabs apart.

Q. You have referred to the stockroom. Where was it located in the Glendale store?

A. It was located on the main floor, the candy stockroom.

Q. Where is it situated with reference to the main selling area?

A. It's in the south end of the building, and there's just two doors leading into the main selling area. The rest of it is off entirely from the main selling area. [198]

The Court: Is it partitioned?

A. Partitioned, yes. It's a big wall.

(Testimony of Evelyn Von Krog.)

Q. By Mr. Wheeler: The stockroom is situated in the area near the receiving docks, is it?

A. Yes, it is right off of the receiving dock.

Q. Do any of the doors from the candy stock room lead directly or open directly into the selling area? A. No.

Q. During the period of December what was the condition with reference to the temperature in the stockroom?

A. We usually preferred to put a sweater on or a coat when we went out there. It is quite cold. The doors are opening outside, and then it is screened all around the stockroom with chicken wire. Even the door's made of chicken wire screening

Q. How many girls were there in the candy department?

A. In our main floor candy department, where we handle fudge, where we handle candy only, we had, I would say, around 12 girls.

The Court: That is regularly?

A. No, sir, that was only during Christmas.

Q. How many did you have regularly?

A. Regularly we have around from two to three.

Q. By Mr. Wheeler: Your candy department is divided, in Glendale, part of it being on the first floor, and [199] part of it in the basement?

A. That's right. Our specialty food and tobacco department is in the basement. The candy department is on the main floor. Our stock room is also separated in the same manner.

(Testimony of Evelyn Von Krog.)

Q. You only sell candy on the main floor?

A. That's right.

Mr. Wheeler: I have no further questions.

Cross Examination

By Mr. Rolston:

Q. As I understand your testimony, Mrs. Von Krog, you never did examine all of the fudge?

A. No.

Q. And the vast majority of the fudge that you did examine on the first occasion was all sold?

A. Most of it was, although there was some we had to put back.

Q. That was before you became ill?

A. That was before I became ill, yes.

Q. It is normal for your department to take a mark-down after Christmas on candy, and specialty items, is it not? A. Yes, it is.

Q. The girls did not like to handle this? It was pretty messy, wasn't it?

A. That's right; they objected very heartily.

Q. By Mr. Rolston: You have the warehouse record, Mr. Wheeler?

Mr. Wheeler: Yes.

Q. By Mr. Rolston: Were you there when this merchandise was returned to stock?

A. I was there half days at that time.

Q. All of the fudge was returned to stock?

A. Everything we had left on hand.

Q. Everything that was left on hand?

A. Yes.

(Testimony of Evelyn Von Krog.)

Q. I show you Exhibit AA, which is the mark-down order. That was in your absence, was it not?

A. Yes, that was while I was out ill.

Mr. Wheeler: I have another witness as to that part, counsel.

Mr. Rolston: O. K. No further questions.

EVA ADAMS,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Please state your name.

The Witness: Eva Adams.

Direct Examination

By Mr. Wheeler: [201]

Q. Miss Adams, you reside in Los Angeles?

A. Yes, I do.

Q. You are employed by Sears, Roebuck?

A. Pardon me, sir. I am residing in Glendale. I work in Los Angeles.

Q. You are employed by Sears, Roebuck and Company in the Boyle Street or 9th Street store at the present time? A. Yes, I am.

Q. Are you employed there as a division manager? A. That's right.

Q. During the period of December and January of 1943, where were you employed?

A. I was employed at Sears' Glendale store.

(Testimony of Eva Adams.)

Q. What was your employment there?

A. I was in the candy department as assistant to Mrs. Von Krog.

Q. When did you first commence work in the candy department at the Glendale store?

A. In September. I don't remember the exact day, but in September of 1943.

Q. Had you had any prior experience in the candy business? A. Oh, yes, many years.

Q. For what company?

A. The Pig 'n' Whistle, in Los Angeles. [202]

Q. For what period of time were you employed by the Pig 'n' Whistle?

A. Over a period of 12 years.

Q. In what capacity were you employed?

A. As head candy girl of various stores that I worked in.

Q. In Los Angeles?

A. In Los Angeles, Pasadena, and Santa Barbara.

Q. Did you have any prior experience in candy other than with the Pig 'n' Whistle?

A. Yes, I did.

Q. Where was that?

A. I worked with the Betsy Ann Ice Cream and Candy Company. They are no longer in business now, but that was before I went with the Pig 'n' Whistle.

Q. How long were you employed by that company? A. Oh, I would say over a year.

Q. Did you have any other experience in candy?

(Testimony of Eva Adams.)

A. Yes, I worked a short time for the Albert Sheetz Company.

Q. In what capacity did you work?

A. I worked in the capacity of candy salesgirl.

Q. Were you employed in a similar capacity with the Betsy Ann Candy Company?

A. Yes. [203]

Q. Do you recall the Pan O' Butter Fudge in the Glendale store? A. Yes, sir, I do.

Q. When did the candy first come to your attention? A. The early part of January.

Q. Prior to the 1st of January, where did you perform your duties?

A. Mostly in the basement, in the food department of the Glendale store.

Q. After the 1st of January?

A. In the candy department mostly.

Q. Did you make any examination of the Pan O' Butter Fudge after the 1st of January?

A. Yes, I did.

Q. What did that examination disclose?

A. Well, I found that it was extremely moldy, and there was a sort of a web on top of it, and what fudge we were able to cut there was discoloration through the fudge, and some of it on top was very moist, like syrup floating around on the top of the squares of the fudge.

Q. Was that the condition of all of the fudge?

A. No, I went through the entire remainder of the fudge that was there, and I segregated the part

(Testimony of Eva Adams.)

that I thought would be saleable and the part that I thought was not saleable.

Q. When did you make that segregation? [204]

A. Well, I made that segregation the first part of January. I can't remember exactly the day, but it was the first part of January.

Q. Did you make any record at that time?

A. Yes, I did.

Q. Of the segregation that you made?

A. Yes, I did.

Q. Do you have that record with you?

A. Yes, right here. It's just on that one page.

Q. Do you recall the quantity of fudge that was unsaleable at that time?

Mr. Rolston: To which I object upon the ground that it calls for a conclusion.

The Court: She has already said she made the segregation. Go ahead. Overruled. You may answer.

A. Well, I think altogether I examined 1500 pounds, and out of that I found over 600 to be salable and over 800 to be what I termed moldy and unsaleable.

Q. Did you have anything to do with the making of the mark-down on the candy?

A. Yes, I believe I did.

Q. I show you Exhibit AA for identification, and I will ask you if that is a record that was prepared by you, or kept under your supervision, during that period? A. I made this myself. [205]

Q. What does it reflect?

(Testimony of Eva Adams.)

A. Well, it's a mark-down taken on 1652 pounds of fudge from 89c to 69c.

Q. That was at the time that you made this examination, was it? A. Yes, sir.

Q. Did you make a later examination of the fudge? A. Yes.

Q. Showing you Defendant's Exhibit Z for identification, I will ask you if you prepared this?

A. No, I did not. I didn't prepare this.

Q. Did you make an inspection of the fudge at the time that the fudge was returned?

A. Yes, I inspected it many times to see what condition it was in, from time to time; not all of it, you understand, but in part.

Q. At the time that the fudge was returned to pool stock did you make an inspection or examination of all of the fudge? A. Yes, I did.

Q. What was the condition of all of the fudge that was returned to pool stock?

A. It was unsaleable and even a worse condition existed than what I mentioned. I found it with mold around the nuts and liquid on the top and a discoloration of the fudge. [206]

Q. It wasn't a good color?

A. It wasn't a natural color.

Mr. Wheeler: I have no further questions.

Cross Examination

By Mr. Rolston:

Q. Mrs. Adams, do you recall the exact day that you made the examination that you testified to?

A. The first examination that I made?

(Testimony of Eva Adams.)

Q. The first examination that you made where you said there were 600 pounds good and 800 bad.

A. Around the first week in January.

Q. It was prior to the mark-down, is that right?

A. Yes, I am quite sure that's right.

Q. You said over 600. Can you tell us a little more accurately how many pounds you found to be, in your opinion, good?

A. I can say it was over——

Q. You can refresh your recollection from notes. Those were made at the time you examined it?

A. Yes, at the time I examined it I made these. I found on hand that was saleable and good——

Q. In your opinion.

A. In my opinion, 683 pounds.

Q. How much was, in your opinion, moist and moldy and runny? A. 852 pounds. [207]

Q. Was that all the fudge you had on hand at that time?

A. Yes, I believe at this time—wait just a minute. I want to think, if you don't mind. If I may change something that I said; this record, as I recall it, was made prior to the time that the merchandise—just prior to the time the merchandise went back. The reason I say that is, the numbers of our pool stock, we are to put on our return requisition—this is No. 8708, and I am quite sure that was made at the time, just before we sent it back to the pool stock.

Q. Your testimony is that you made that ex-

(Testimony of Eva Adams.)

amination on or about January 21st, rather than the first week?

A. Yes, it was the latter part of January.

Q. That was the first time you examined the stock? A. No, it was not.

The Court: It was the final examination, before you returned it?

A. That's right.

Q. When the final return was made, Mrs. Adams, all of the fudge that you had on hand went back, is that right?

A. I am not positive that all that we had on hand went back, or all that we considered unsalable went back. I am not sure; I don't want to say.

Q. However, your mark-down takes in all merchandise you had on hand at that time?

A. Yes, at the time that I inspected it.

Q. Did you make any attempt to dry out any of the so-called runny fudge?

A. Yes, I did. Some of it, when I took over when Mrs. Von Krog was ill, was out of the cartons.

Q. Did you use that fudge?

A. It did not dry out, sir.

Q. None of it?

A. None of it dried out, no, sir.

Q. Did you have any trouble with the girls, so far as the handling of it? Did they like to handle it?

A. I don't recall if we especially asked them if they liked to handle it in the stockroom. It was my business to go through this, and I did so, and

(Testimony of Eva Adams.)

what I thought was good I put up for sale, and what was not, I didn't.

The Court: What counsel means is, did the girls complain when they cut it? They cut the slabs——

A. That's right.

Q. Into little squares?

A. Yes. What I took out for sale, you were able to cut the part I segregated; you were able to cut it, and there was no complaint on it.

Mr. Rolston: That is all. [209]

Mr. Wheeler: I have no further questions.

(Whereupon an adjournment was taken until 1:30 p. m. of this same day, Wednesday, January 10, 1945.) [210]

Wednesday, January 10, 1945.

Afternoon Session, 1:30 o'clock

FRANCES MURRELL,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: State your name.

The Witness: Mrs. Frances Murrell.

Direct Examination

By Mr. Wheeler:

Mr. Wheeler: I offer retail requisition No. 130346, dated 11/15/44.

The Clerk: BB for identification.

(Testimony of Frances Murrell.)

Mr. Wheeler: Retail requisition No. 754992, dated 22nd, '44.

The Clerk: CC for identification.

Mr. Wheeler: Mark-down form No. 145652, dated 1/8/44.

The Clerk: DD for identification.

Q. By Mr. Wheeler: Mrs. Murrell, you are a resident of San Diego, California, are you?

A. Yes.

Q. And you are employed by Sears-Roebuck and Company as a division manager in the candy department? A. That's right.

Q. How long have you been employed by Sears, Roebuck and [211] Company?

A. Four years.

Q. You have acted as division manager for a considerable period of time? A. Yes.

Q. Calling your attention to Pan O' Butter Fudge, during the period from November, 1943, to February, 1944, did you have Pan O' Butter Fudge in the San Diego store? A. Yes, we did.

Q. Calling your attention to Defendant's Exhibit BB, I will ask you if that record was kept and maintained under your supervision and control?

A. Yes, it sure was.

Q. What is that record?

A. It shows that we received 1674 pounds of the pecan chocolate fudge.

Q. Does it reflect the date on which you received it?

A. We received it on December 8, 1943.

(Testimony of Frances Murrell.)

Q. You received the invoice at the time you received the fudge, is that correct?

A. That's right.

Q. And you checked the candy you received against the invoice or requisition?

A. That's right.

Q. Showing you Defendant's Exhibit CC for identification, [212] I will ask you if that is a record which was kept and maintained under your supervision and control? A. Yes.

Q. What is that record?

A. This shows that we shipped this from our store back to the L. A. pool stock, L. A.

Q. Does it show the quantity shipped back?

A. Yes, we shipped 1224 pounds.

Q. Does it show the date on which you shipped this? A. The 22nd of January, 1944.

Q. Showing you Defendant's Exhibit DD for identification, I will ask you if that was a record that was kept and maintained under your supervision and control?

A. Yes, it was. This shows the mark-down which we took.

Q. Does it reffect the quantity of merchandise that was marked down?

A. Yes, it shows we marked down 1344 pounds.

Q. Of the Pan O' Butter Fudge?

A. Yes.

Q. Does it show the date on which you took the mark-down?

A. Yes, I took this on January 8th, 1944.

(Testimony of Frances Murrell.)

Q. Mrs. Murrell, with reference to the date that you received the Pan O' Butter Fudge, did you make any examination [213] of the fudge at that time?

A. Yes, we always do. We always examine, not all of it, but most of every kind of merchandise we get in; and we did this.

Q. What did your examination disclose?

A. The first we opened up was hard. When we cut it it would become crummy. Then as we opened the other we found some of it would be soft, which was very hard and difficult to cut.

Q. Did you make any further examination of the candy?

A. Not just then. I couldn't say, because we had opened a considerable amount of it which we found would become that way. Part of it was good, and the other part was just sticky. Then later we did.

Q. With reference to the candy that you describe as sticky, did you cut it?

A. We would cut it, but instead of putting it out in squares, like we usually do, in waxed papers, we would have to use little cups to put the candy in, because it was so sticky we couldn't handle it.

Q. Did you sell it in the cups?

A. Yes, we did.

Q. With reference to the date of the mark-down, did you make an examination of the fudge at that time?

A. Oh, yes, we made it at the time we took the

(Testimony of Frances Murrell.)
mark-down. [214] We also found it was in the same kind of condition. It would be hard, and others would be soft.

Q. Did you observe any mold on the candy at any time? A. Yes.

Q. When was the first time that you observed mold?

A. I would say it was approximately the 8th or 10th of January that we noticed that.

Q. That would be about the time that you made the mark-down.

A. That was just after we made the mark-down.

Q. Did you make any examination of the fudge at a later date?

A. Well, at the time that we found this was moldy that is when we went through every box of fudge that we had on hand.

Q. What did you find on making a complete examination of the fudge?

A. We found that it was moldy around the pecans on top, and also around the edges we would find it moldy. A great deal of it was still very soft. Most of it was all very soft, and we would find some was still hard, and would crumble if we had tried to cut it.

Q. At the time you made the mark-down did you have any of the Pan O' Butter Fudge in stock than that you marked down? [215] A. No.

Q. You returned part of the candy to the L. A. pool stock, did you not? A. Yes, I did.

Q. At the time you returned the candy to the

(Testimony of Frances Murrell.)
pool stock did you make any examination of the portion of the candy that you returned?

A. We again had to go over it, because we had instructions to do so, and we went through every box again, and I was there at the time every box was opened.

Q. With reference to the candy that was returned to the pool stock, what was the condition of that candy? A. It was very moldy.

Q. How many people did you have in the candy department during this Christmas period?

A. During Christmas time?

Q. Yes.

A. Altogether I had 10. I had four regulars.

Q. During the normal period of the year how many people do you have in the candy department?

A. Three.

Q. Where was your stockroom located?

A. My stockroom is on the fifth floor of the building.

Q. The candy was stored in that stockroom?

A. Yes. [216]

Q. How much would you take onto the selling floor during the course of the day?

A. Not more than 50 pounds at a time.

Q. With reference to the stockroom, where in the building was it located?

A. It's on the fifth floor, and it is near the south side where there are quite a few windows.

Q. Are those windows kept open?

A. Yes, most of them are.

(Testimony of Frances Murrell.)

Q. What was the condition with reference to the stockroom during the period of November and December and January, in this period in 1943 and '44?

A. Our stockroom is always kept in order.

Q. With reference to temperature.

A. It's very cool.

Mr. Wheeler: I have no further questions.

Cross Examination

By Mr. Rolston:

Q. Did I understand, Mrs. Murrell, the first time you noticed any mold was after the mark-down? A. Yes.

Q. Up to that time all the candy that you had in showed no mold at all?

A. Yes, that we had opened.

Q. Do you know how the merchandise was shipped down to [217] your store?

A. Yes, it comes by our Sears' Signal truck.

Q. Do you know whether or not that truck is refrigerated? A. That I could not say.

Q. Do you recall the size of the cartons that you handled, how heavy they were?

A. I'm not sure.

Q. Do you know whether or not the slab was a 9-pound slab or a 14-pound slab?

A. I believe the boxes and all would weigh about 18 pounds.

Q. How large is the candy stockroom where this was stored?

(Testimony of Frances Murrell.)

A. Oh, I would say it was about 8 by 12.

Q. Do you recall how high these cartons were stacked?

A. These cartons were stacked not more than five high, because of the shelves that we have in the stockroom.

Q. Was all of this fudge stacked on the shelves?

A. Yes.

Q. Did you have much other candy in the stockroom? A. No.

Q. That was the only candy that was in the stockroom?

A. No, that was not all that we had in there, but at that time our stock was getting very low.

Q. The girls did not like to handle this fudge, did they? A. No.

Q. It was a little messy to handle?

A. That's right.

Q. When you first noticed that some of the fudge was hard, did you notify Mr. Ashby?

A. Yes, he was notified.

Q. Did you notify him?

A. My merchandising man notified him.

Q. You told somebody to notify him, and that is as far as you know personally?

A. I know he notified him, because I had him talk to him over the telephone.

Q. Was Mr. Ashby notified of the soft condition of the candy as well?

A. Yes, at the same time.

Q. Do you recall, when you first examined it,

(Testimony of Frances Murrell.)

what proportion was good, what proportion was, as you call it, soft, and what proportion hard?

A. When we went over it?

Q. The first examination that you referred to.

A. The first time—do you mean all of it?

Q. No, what you examined of it.

A. What we examined when it first came in, we took in [219] about 10 or 20 of the cartons, and they were fine.

Q. The first 30 were fine? A. Yes.

Q. You used them all? A. Yes.

Q. That was the first time you examined them?

A. That was the first time, yes.

Q. That was on or about December 8th?

A. No, that was when it first came in.

Q. Didn't you testify it first came in on December 8th?

A. You asked me the first time I examined it.

Q. The first time you examined it they were all good? A. Yes, that's right.

Q. That was December 8th?

A. Yes, that's right. Pardon me.

Q. Did you sell all of the fudge you examined on that first occasion? A. Yes, we did.

Q. The only reason you used only 50 pounds per day, approximately, was because that was all you had calls for, is that right?

A. That's right.

Q. When did you start using these cups?

A. We started using them about the first of the year. [220]

(Testimony of Frances Murrell.)

Q. It was after Christmas? A. Yes.

Q. Had you taken any mark-down at that time?

A. No.

Q. These cups you have mentioned are just little candy paper cups, is that right? A. Yes.

Q. They are not drinking cups, or anything of that nature? A. No.

Q. Just a little piece of paper; you put an individual piece of candy in each paper?

A. That's right.

Q. And you sold that candy that way?

A. Yes.

Q. Did you sell all the soft candy you had that way? A. No.

Q. You sold a good portion of it?

A. No.

Q. Of all the candy that you used or examined up to January 10th you never discovered a moldy condition prior to that, is that right?

A. No, we did not.

Q. In other words, that statement is a correct statement; you did not discover any mold? [221]

A. That's right.

Mr. Rolston: That is all.

Mr. Wheeler: I have no further questions.

The Court: Call you next witness.

AMY WADE,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Please state your name.

The Witness: Amy Wade.

Mr. Wheeler: I offer retail requisition No. 130345, dated 11/15/43.

The Clerk: EE for identification.

Mr. Wheeler: And retail requisition, returned merchandise, No. 256410, dated 1/21/44.

The Clerk: FF for identification.

Mr. Wheeler: Mark-down form No. 736220, dated 1/12/44.

The Clerk: GG for identification.

Mr. Wheeler: Mark-down form No. 736221, dated 1/24/44.

The Clerk: HH for identification.

Direct examination

By Mr. Wheeler:

Q. Mrs. Wade, you are a resident of the City of Pasadena? [222] A. Yes, sir.

Q. You are employed as a candy division manager of the Sears-Roebuck and Company store, Pasadena? A. Yes, sir.

Q. How long have you been employed by that company? A. About six years.

Q. How long have you been employed as division manager? A. Almost two years.

Q. In the candy department? A. Yes.

Q. Had you had any previous experience with

(Testimony of Amy Wade.)

candy prior to your employment as division manager? A. Yes, sir.

Q. What was that experience?

A. In our own business, from about 1929 to 1939.

Q. That is, in the retail candy business?

A. Yes, sir.

Q. Calling your attention to the period from November, 1943, to February, 1944, I will ask you if you had Pan O' Butter Fudge in the Pasadena store of the company? A. Yes, sir.

Q. Showing you Defendant's Exhibit EE for identification, I will ask you if that is a record that is kept and maintained under your supervision and control? A. Yes, sir. [223]

Q. What does that record reflect?

A. The receipt of 1960 pounds of Pan O' Butter Fudge.

Q. Does that reflect the date on which you received it? A. Yes, the 18th of November.

Q. I show you Defendant's Exhibit FF for identification, and I will ask you if that record is kept and maintained under your supervision and control? A. Yes, sir.

Q. What is that record?

A. This shows we returned 602 pounds to the pool stock at the request of Mr. Ashby.

Q. Does it show the date you returned it?

A. Yes, on the 24th.

Q. 1944? A. Yes.

Q. Showing you Defendant's Exhibit GG for identification, I will ask you if that is a record that

(Testimony of Amy Wade.)

was maintained under your supervision and control? A. Yes, sir.

Q. What record is that?

A. We marked down 944 pounds of Pan O' Butter Fudge from 89c to 69c on the 8th day of January, 1944.

Q. Showing you Defendant's Exhibit HH for identification, I will ask you if that is a record maintained under your supervision and control?

A. Yes. That shows we marked down 14 pounds on January 24th, from 89c to 69c.

Q. I will ask you to examine it closely.

A. It shows marked down from 69 to nothing. It previously had been marked from 89 to 69.

Q. That particular record shows a mark-down of 14 pounds from 69c to nothing?

A. Nothing.

Q. On the 24th of January, 1944?

A. On the 24th of January, 1944.

Q. Mrs. Wade, with reference to the receipt of Pan O'Butter Fudge in the Pasadena store, did you make any examination of the fudge, or any part of it, at the time of its receipt?

A. I did.

Q. What examination did you make?

A. We went through our entire shipment.

Q. What did that examination show?

A. It showed that some of it, the boxes were wet and sticky on the outside. We opened them and found they were practically swimming in syrup. Others were dry, and had mold on them around the

(Testimony of Amy Wade.)

nuts, and around the edge of the cartons, some even were so hard and moldy you couldn't tell one slab from the other.

Q. What do you mean, you couldn't tell one slab from [225] the other?

A. Two slabs were packed in the boxes, and those two slabs were so melted together, and moldy, you couldn't tell but what it was all one slab.

Q. Did you sell any of the candy?

A. Yes, sir.

Q. Did you make a further examination of the candy?

A. We watched it all the time, because as we opened the shipments, as it came in, it looked like something was wrong; some of it was so soft it wouldn't hold its shape. We opened it, and tried to dry it. Some would dry, and some would continue to mold.

Q. Did you make any examination of the candy at the time you took the first mark-down, on January 12th?

A. Yes, we knew it was in poor condition.

Q. Did you make any examination of the entire amount of fudge at the time that you returned some of the candy to the pool stock? A. Yes, sir.

Q. What was the condition of the candy that was returned to pool stock?

A. Most of it was very hard and all moldy.

Q. With reference to the second mark-down, what was the circumstance with reference to that?

A. That was in such bad condition we thought

(Testimony of Amy Wade.)

we had [226] better throw it away than to even try to ship it back.

Q. That was about the time you took the other merchandise back to the pool stock warehouse?

A. Yes.

Q. Where was the storeroom in Pasadena, the candy storeroom?

A. In Pasadena it is located on the sixth floor.

Q. Where was it with reference to any sales area?

A. It's the first stockroom above the fifth floor, which would be the sales room.

Q. There is no sales area on the sixth floor?

A. No, sir.

Q. What was the situation in the stockroom with reference to temperature?

A. Our stockroom at this particular time of the year would average from 60 to 67 degrees.

Q. How many people did you have employed in the candy department during the Christmas period?

A. Four regulars; about six extra people.

Q. After Christmas, how many did you have employed? A. Four.

Mr. Wheeler: I have no further questions. You may examine.

Cross Examination

By Mr. Rolston:

Q. How large is the stockroom? [227]

A. It goes clear across the entire width of our building.

(Testimony of Amy Wade.)

Q. That is the candy room?

A. My candy stockroom goes across the entire sixth floor.

Q. It is separated from other parts of the stockroom by wire, isn't it? A. Yes.

Q. Open mesh wire? A. Yes.

Q. There are windows in the stockroom?

A. Yes, sir, there is a cross-section of air. There are windows on both sides.

Q. They open onto the storeroom as well as onto the outside of the building, is that correct?

A. That's right.

Q. How high were these cartons stacked in there?

A. As I remember they only stack about three cartons high.

Q. Did you individually inspect each and every carton that came in? A. I did.

Q. That was at the very beginning, the first day? A. Yes, sir.

Q. At that time you noticed that some was already moldy? [228]

A. Yes, sir.

Q. Do you recall the size of the cartons, that is, their weight? A. No, sir, I don't.

Q. Do you recall the weight of the slab? Was it a 9-pound slab or a 14-pound slab?

A. It wasn't 14. I couldn't give you the actual weight. I know there were two slabs to the box with a piece of waxed paper between.

(Testimony of Amy Wade.)

Q. Taking one slab at a time, do you recall whether it would be closer to 9, or closer to 14?

A. It would be closer to 9.

Q. The 14 pounds represented by the mark-down sheet HH, was that one piece, or several pieces?

A. I can't say about that; it has been too long ago; I have forgotten. As I remember it was parts of several.

Q. Do you recall how long that merchandise was in the sales department there? A. No, sir.

Q. Could it have been there more than a week?

A. I can't say about that.

Q. You don't recall how long it was there?

A. No, sir.

Q. Do you recall what the store temperature was? A. It averaged between 60 and 67.

Q. That's throughout the store?

A. My stockroom. I don't know what the sales floor is.

Q. You are in charge of the sales floor as well?

A. Yes.

Q. All the girls worked under your direction?

A. Yes.

Q. You had a little trouble with them, didn't you? They didn't like to handle this fudge?

A. Indeed we did.

Q. They did not like to get their hands dirty handling it, is that right?

A. That's right; their clothes as well.

Q. It was warmer in the storeroom than it was in the stockroom, however, wasn't it?

(Testimony of Amy Wade.)

A. Repeat the question again.

Q. It was warmer in the sales room than it was in the stockroom, wasn't it? A. Yes, sir.

Q. Did you report to Mr. Ashby this condition you found on November 18th? A. Yes, sir.

Q. You reported to him yourself?

A. Yes, sir.

Q. At that time you told him some of it was moldy? [230] A. Yes.

Q. Some of it was runny? A. Yes, sir.

Q. Some of it was hard? A. Yes, sir.

Q. Did he come over and see those samples that you had, of each condition?

A. I can't say about that. I don't remember.

Q. Do you know what proportion of the merchandise you examined was moldy?

A. I would say one-third.

Q. How much was hard?

A. Approximately one-third.

Q. How much of it was swimming in syrup?

A. In other words, what would be salable, I can't say the exact proportion of that. Some of it dried out; some didn't.

Q. When you first examined it some of it was already dry, wasn't it?

A. Yes, some of it was dry; some of it was salable, surely.

Q. Did you sell that dry fudge?

A. Yes, sir.

(Testimony of Amy Wade.)

Q. Did you sell the fudge that was swimming in syrup? A. No, sir. [231]

Q. Did you sell any moldy fudge?

A. No, sir.

Q. About how much was swimming in syrup, as you describe it?

A. I don't remember. I remember seeing several cartons just really soaked with syrup. I can't say how many pounds.

Q. Just a few?

A. Considerable; several packages.

Q. Did Mr. Ashby tell you to open the package, and let it dry out over night, and use it the next day?

A. He said to open it and let it dry.

Q. Did you do that? A. Yes.

Q. Did you use a portion of what you opened and dried?

A. Some we did; some we did not.

Q. The part that was dry you used?

A. Yes, sir.

Q. At the time of the first mark-down, which I believe was January 12th, according to Exhibit GG—that's the 994 pounds? A. Yes, sir.

Q. Was that all the stock you had on hand at that time? A. I believe so.

Q. After that time you sold some of that stock, didn't you? [232] A. Yes, sir.

Q. On January 24th, the amount specified on

(Testimony of Amy Wade.)
Exhibit FF that was returned to the pool, that was all the fudge you had left on hand?

A. Yes, sir.

Q. Was there any change in the condition of the fudge between the time you first examined it and January 12th, to your knowledge?

A. Some had mold. Even though we opened it to dry, it would have mold anyway.

Q. Some of it was dried out and used?

A. That's right.

Q. Did you report to Mr. Ashby from time to time as to any change of condition?

A. We did.

Mr. Rolston: That is all.

Mr. Wheeler: I have no further questions. Mr. Arnold.

WILLIAM L. ARNOLD,

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Please state your name.

The Witness: William L. Arnold. [233]

Direct Examination

By Mr. Wheeler:

Q. Do you have some records with you, Mr. Arnold? A. I do.

Q. Will you take them to the stand with you. Do you have a card similar to this, Mr. Arnold?

(Testimony of William L. Arnold.)

A. Yes, sir.

Q. I will take the original and and you take the copy. This is marked Bower-Giebel Co. It does not appear to have any date. It is headed "Department 8708. Stock No. 87 P. C. 103".

The Clerk: II for identification.

Q. By Mr. Wheeler: I show you Defendant's Exhibit II for identification, and I will ask you if that is the record of the company which is prepared and maintained under your supervision and control? A. It is.

Q. What is that record, Mr. Arnold?

A. It is what we call the stop record, a record of inventory, from which we maintain perpetual inventory.

Q. What is your position with the company?

A. Stock merchandise manager of the L. A. pool stock.

Q. Your office is situated in the L. A. pool?

A. That's right.

Q. How long have you been in that position?

A. I have been in that particular position a year and nine months.

Q. How long have you been with the company?

A. Almost nine years.

Q. With reference to this card, will you explain the method of preparing it?

A. The first we do, when a source is established for any commodity, we have four separate postings, at the upper lefthand corner of the card, which indicates the company or the source; in this

(Testimony of William L. Arnold.)

case the Bower-Giebel Company was listed under source A, indicating the factory cost in the unit, the discount, either net, cash, f.o.b. Point, and transportation allowance. In the upper righthand corner we identify the particular merchandise, and the division, which is 87 P.C. 103.

Below that we indicate the amount, giving the description. In the lefthand side of the card is a space for our orders, which we place, indicating that order No. 407215 was placed with source A, Bower-Giebel Company, on October 20, 1943, to be shipped on November 5th, and the amount of the order was 28,000 pounds.

Q. That information was prepared from a purchase order, a copy of which purchase order I have handed to you?

A. The purchase order which was sent to me by Mr. Ashby's office. [235]

Q. Then, after the receipt of this purchase order and the setting-up of the card, what record would be maintained on the card?

A. The receipt and disbursement of all commodities are maintained on such stock record cards.

Q. What was the procedure involved in setting up the record of receipt and disbursement?

A. I will take the disbursement first. Disbursement was handed to us, or passed on to our office by Mr. Ashby's office on a form setting up each store, and indicating the quantity of pecan chocolate fudge to be disbursed to each particular store.

(Testimony of William L. Arnold.)
A requisition form was created by Mrs. Feverly, the stock record clerk.

Q. What form number?

A. The form number is the requisition number on which all shipments are made out of pool stock.

Q. That is something that does not appear here?

A. It is made up from this allocation sheet handed to us by Mr. Ashby, which was created by Mrs. Feverly out of this allotment allowance, which was created and disbursed, so far as the sheets are concerned, November 13th. In other words, we made all requisitions on this day.

Q. When the merchandise was received would its receipt be noted on this card?

A. Yes, sir, in the column headed "Receipts", which [236] indicates the first shipment was received 11/16; amount 1680.

Q. The column appearing on the card headed "Orders", what does that reflect?

A. The lefthand side of the card?

A. Yes.

A. That is the information from the original purchase order 407215, and from that, reading down from top to bottom, 11/16, and under "Routing" appears the number 4257, and taking the receipt of 1680 and deducting it from 28,000 leaves 26320, and each subsequent receipt is noted in the same manner indicated.

Q. And the dates listed under "Receipts" shows the quantity received on that particular day?

A. I wouldn't say on that particular day. It's

(Testimony of William L. Arnold.)

the day we checked the merchandise in. The merchandise, I would say in almost 100 per cent of the cases, is received a day prior to the day shown on this card, but in no instance more than one or two days' difference between the date of receipt in the warehouse and the date the entry is made on the card.

Q. Would you have a record which would show the date received?

A. I do; each and every receipt of each and every shipment. [237]

Q. Will you examine the first document that you have that shows the date of receipt? The first item listed under "Receipts" on this card is——

A. 1680 pounds.

Q. That was received in the L. A. pool stock November 15, 1943. The second item, 3096 pounds?

A. There was some controversy with reference to this particular shipment, inasmuch as our invoice called for 108 cases, 28 pounds to the case, and 56 cases, 18 pounds to the case, and there was actually received 72 cases, 28 pounds to the case, and 60 cases of 18 pounds to the case, or there were over-shipped four cases of the 18-pound shipment, and we were short 36 cases of the 28 pounds to the case. The order was short 936 pounds against the billing.

Q. What is shown as the date of receipt?

A. The date of receipt 11/17/43.

Q. Can you tell me what was the date of receipt for the next item, which is 2800 pounds?

(Testimony of William L. Arnold.)

A. The 2800 pounds was received 11/17/43.

Q. The next item, which is 4446 pounds?

A. Received on 11/22/43.

Q. And the next item which is 1188 pounds?

A. Was received 11/23/43.

Q. The next item, 4140 pounds?

A. Received on 11/24. [238]

Q. The next item, which is 3060 pounds?

A. Was received 12/3.

Q. The next item which is 4068 pounds?

A. Was received 12/4.

Q. The next item which is 1314 pounds?

A. Was received 12/4.

Q. The next item which is 4140 pounds?

A. Was received 12/4.

Q. Now, with reference to the column of figures that appear on the card marked in red, what do those figures reflect?

A. At the lower lefthand corner?

Q. Yes.

A. Those are the retail returns, or what we call R.M.R. They are carried on the same form as the Retail Store requisition, on which shipments are made on the form, but they are indicated usually as returned merchandise. The second column shows the dates they were received; the third column is the quantity, indicating the store number immediately above the quantity, in one column, and then again in the current and cumulative, from top to bottom.

Q. The column figures in red which commences

(Testimony of William L. Arnold.)
with the first red figure 888279, under "Average", what do they show?

A. They are the R.M.R. requisition number under which it was returned to pool. [239]

Q. Do you have the records that you maintain under your supervision and control that reflect the date of shipment of merchandise to the various stores? A. Yes, sir.

Q. In what form are those records?

A. They are in a form of what we term as drivers' sheets. We have inter-van service between the L. A. pool stock and the various local stores which move on regular set schedule every hour, every two hours, depending upon the store. The sheets are all numbered, made in duplicate, and the original copy of the drivers' sheet accompanies the load to the respective stores. It is signed for by the receiving clerk in that particular store. The duplicate we keep in the files, and it becomes a permanent record.

Mr. Wheeler: I will ask that this be marked JJ for identification.

The Clerk: JJ for identification.

Q. By Mr. Wheeler: This is headed "Pecan Chocolate Fudge" dated 1-8-44. I show you Defendant's Exhibit JJ for identification, and I will ask you, Mr. Arnold, if you prepared a summary from the records that you maintain under your direction and supervision?

A. I prepared this report, yes, sir.

Q. And that is an accurate summary of the

(Testimony of William L. Arnold.)
transactions reflected by those records that you maintain? [240]

A. It is a record reflected from taking the information contained in these drivers' sheets or load sheet.

Q. And you prepared this summary?

A. I did.

Mr. Wheeler: This is an exhibit entitled "Pecan Chocolate Fudge" 1-8-45, with the pencilled notation "In Coming or Returns".

The Clerk: KK for identification.

Q. By Mr. Wheeler: I show you Exhibit KK for identification, and I will ask you if that is a summary of the information with reference to returns of the pecan fudge to the pool stock store?

A. It is.

Q. Was this prepared by you? A. It was.

Q. From records you maintain under your supervision and control? A. Yes, sir.

Q. That you have available here?

A. Yes, sir.

Q. With reference to Exhibit for identification JJ, does this exhibit show each of the stores to which merchandise, pecan chocolate fudge, was sent?

Q. Does it show the date shipped? [241]

A. It does.

Q. The quantity shipped? A. It does.

Q. The number of cartons? A. Yes, sir.

Q. And the requisition number?

A. Yes, sir.

Q. With reference to Exhibit KK for identifi-

(Testimony of William L. Arnold.)

cation, does it show the stores from which it was returned? A. It does.

Q. The requisition numbers covering the return? A. R.M.R. numbers, yes, sir.

Q. The quantity returned?

A. That's right.

Q. And the date of return?

A. That's right.

Q. That would be the date that it was received in the pool stock warehouse? A. Yes, sir.

Q. When this fudge would be received in the pool stock what would be its handling, Mr. Arnold?

A. The original shipment, or the return shipment or the return shipment?

Q. The original shipment.

A. The original shipment is delivered to our receiving dock, which is on the west end of our building, and is given [242] an in freight number, typed from the driver's sheet, handed up by the truckling company, and from there it is immediately dispatched to the east end of the building, which is our disbursing center for this type of merchandise. We keep this type of merchandise, sundry items, such as candy and knit goods, and small items, all in the miscellaneous division 80, and from that they are distributed to the various stores or respective divisions.

Q. Is the candy stored in the warehouse, or in the pool stock warehouse between the time of receipt and transshipment to warehouse or stores?

A. Just long enough for us to re-label the mer-

(Testimony of William L. Arnold.)
chandise and dispatch it on the inter-store vans, depending on the manpower available at that particular time.

Q. What is the period of time involved?

A. It usually takes one to two days; not over three days.

Q. When the candy was returned, what was its handling?

A. Well, to insure that no pilferage would take place when the candy came back, we put it in what we call our fur room. That was a room that was not being used at that particular time, due to the fact that fur storage does not start until the summer months. We placed this candy in this room, more so to keep anyone from pilfering than anything else. [243]

Q. Do you still have the candy at the pool stock?

A. I do.

Q. Have you made any examination of its condition? A. Several times.

Q. What was the examination you made? When was the first time you made an examination?

A. The first time I made the examination was at a time I think when all the stores' returns were in with the exception possibly of San Diego. At that time we had stored all of the candy in this fur room. Mr Theaker was there. I don't recall whether Mr. Ashby was there or not; but they came over to the warehouse. I obtained the key from the office, and went over and unlocked the fur room

(Testimony of William L. Arnold.)

so that we could go in. That was the first time I examined the candy, or any part of it.

Q. What examination did you make at that time?

A. We opened, I don't know how many cartons; there were several of them, but some were soft, mushy, and others were hard, and they were most all moldy.

Q. Did you make any further examination of the candy?

A. Yes, I have, several times.

Q. What has been the condition at the times of the subsequent examinations?

A. Just got worse and worse, and now they are not only moldy, but they have a lot of worms in them. [244]

Q. You brought down two boxes of the fudge?

A. I brought down one 28-pound carton and one 18-pound carton.

Q. Those are the two cartons on the desk?

A. They are.

Mr. Wheeler: If your Honor please, I think it would probably just add work to the clerk's office——

The Court: You can describe them; not introduce them into evidence, but just exhibit them and describe them.

Mr. Rolston: Furthermore, I think it is objectionable, and it will have no tendency to show the condition.

The Court: Of course, it is rather remote.

(Testimony of William L. Arnold.)

Mr. Rolston: It is extremely remote.

Mr. Wheeler: It was not with reference to the condition of the fudge; it was as to the box itself.

The Court: I don't think it is material. It has been described sufficiently.

Mr. Wheeler: There was one point, your Honor. There has been some testimony to the effect, I think Mr. Pocius testified that they were not stacked more than five cartons.

The Court: What do they show?

Mr. Wheeler: They don't show anything.

The Court: He said five or seven.

Mr. Rolston: I believe he said seven.

Mr. Wheeler: Whatever his testimony was.

The Court: You gentlemen can agree to what they show. If they don't show anything, it is negative testimony. What do they show?

Mr. Wheeler: They don't show anything on the sides.

The Court: I don't think you need bother, because the condition at the present time would not be very material, because it is pretty remote. They have been taken out of the circulation, and it is quit remote at the present time. Even the best of the fudge is spoiled right now, a year after.

Mr. Wheeler: At this time I offer the exhibits marked for identification.

The Court: They will be received, under the rule of summaries made from books, the originals of which are in court subject to inspection by opposing counsel.

(Testimony of William L. Arnold.)

Mr. Wheeler: That is correct. II, JJ and KK.

The Court: All right.

Mr. Wheeler: I have no further questions. You may examine.

Cross Examination

By Mr. Rolston:

Q. Mr. Arnold, are you familiar with the trucks or vans they use? A. I am, yes.

Q. Are they refrigerated?

A. They are not. [246]

Q. Was the pool stockroom refrigerated?

A. The fur room, the main fur room, is not refrigerated.

Q. Is the rest of the stockroom refrigerated?

A. No, the warehouse doesn't need refrigeration during the winter months. From now on it's a pretty cool warehouse.

The Court: What would you say would be the average temperature?

A. The average temperature is anywhere from 50 to 65 degrees.

The Court: It wouldn't be comfortable?

A. It wouldn't be comfortable to walk around during this time of the year. It is 850 feet long.

The Court: It is open?

A. Yes; shipping doors on one side and shipping doors on the other, and the west end is open?

Q. By Mr. Rolston: This fur room has a mothball odor to it?

A. I don't know whether it does.

Q. Naphthalene?

(Testimony of William L. Arnold.)

A. I don't know whether it is naphthalene, or what it is, but there is an odor in there, but the candy was not stored in the room until it was returned from the store.

Q. I just wanted to know. [247]

A. There is a definite naphthalene odor in there, or an odor pertaining to furs, and keeping moths out of furs.

Mr. Wheeler: At this time, before resting my case, I would like to offer for introduction into evidence each of the exhibits that have been referred to by the various witnesses as being company records maintained under their supervision and control.

The Court: Where do they begin, Mr. Somers?

The Clerk: I haven't the entire list with me.

The Court: They are sufficiently identified as being the various documents as to which the various managers testified. The witnesses used them merely to refresh their recollection, and I don't think there can be any objection to having them received into evidence. They will be received in evidence.

Mr. Rolston: They start with E.

Mr. Wheeler: At this time the cross-complainant rests.

(Short recess.)

Mr. Rolston: If the court please, there is one witness, Mr. Erhart, whom I would like to recall for cross examination under the counter-claimant's case. Mr. Wheeler has no objection.

The Court: All right. [248]

ALPHONSE ERHART,

recalled.

Further Cross Examination

By Mr. Rolston:

Q. Mr. Erhart, on the occasion that you went over to see Mr. Ashby at his office, in the latter part of November, you examined several cases at that time, I believe? A. That is correct.

Q. Did you notice any mold on any cases whatsoever? A. Not at that time.

Q. Did Mr. Ashby talk of any mold at that time? A. Not that I recollect.

Q. Did he talk of any hard candy at that time?

A. The discussion was mainly about the moisture of the fudge. It was on his statement that I made the recommendation.

Q. That was the only point that Mr. Ashby brought up, or the only statement concerning the fudge at that time?

A. To my memory, yes.

Q. During that conversation did you in any way tell Mr. Ashby that he should proceed to use as much as he could, and Bower would make good any defective or any unsaleable merchandise that remained?

A. Definitely not. We went over that yesterday.

Mr. Rolston: That is all. [249]

Redirect Examination

By Mr. Wheeler:

Q. Mr. Erhart, during the course of the conversation Mr. Ashby told you that he would con-

(Testimony of Alphonse Erhart.)
tinue to use the merchandise, and there might be an adjustment later?

A. As I recall the conversation, Mr. Wheeler, Mr. Ashby stated to me that he was going to follow my recommendation. I do not recall any conditions that he made upon it, but he did suggest he was going to follow my recommendation and attempt to use the fudge.

Mr. Wheeler: I have no further questions.

Mr. Rolston: At this time, your Honor, I wish to enter a motion that the counter-claim has not been proven; that there is no sufficient proof; that counter-claimant by his own testimony has clearly indicated that he had bought the merchandise; that he advised Mr. Bower that he was going to stop payment of the order, and recommended that Mr. Bower stop his checks. Thereafter he decided he could use the fudge, and he was going to pay the invoices; and, further, that Mr. Bower could release his checks at that time, completely taking off any previous warranties. He had full knowledge at that time of all alleged defects of the fudge, and every store reported to him every detail.

The Court: The motion will be denied.

Mr. Rolston: I will call Mr. Mitchell. [250]

R. E. MITCHELL,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

The Clerk: Please state your name.

The Witness: R. E. Mitchell.

Direct Examination

By Mr. Rolston:

Q. Mr. Mitchell, what is your business or occupation? A. I am a food broker.

Q. Do you specialize in candy?

A. Candy and specialty foods.

Q. For how long have you been following that occupation? A. About 14 years.

Q. During the 14 years you have sold a great deal of bulk candy?

A. From time to time, yes.

Q. Also other types of candy as well, of course?

A. Yes.

Q. Are you familiar with fudge in particular, in any respect?

A. I don't believe I can answer that yes or no.

Q. You have had some dealings in fudge, though? A. Yes.

Q. In addition to this particular transaction?

A. Yes.

Q. Over a period of years? A. Yes.

Q. You were present, I believe, at a conversation in Mr. Bower's office the latter part of October, I believe October 20th, at which Mr. Erhart, Mr. Bower, Mr. Ashby were present? A. Yes.

(Testimony of R. E. Mitchell.)

Q. During the course of that conversation did Mr. Bower make any warranties of any type or description?

Mr. Wheeler: I object to that as calling for the conclusion of the witness as to what are warranties.

Mr. Rolston: I will withdraw the question.

The Court: I think that calls for a conclusion.

Q. By Mr. Rolston: Will you relate the conversation?

The Court: Besides, under the Civil Code, food and edible articles are warranted fit for consumption. The Supreme Court has so held.

Mr. Rolston: There is no doubt about that.

The Court: Anything that is moldy is not fit for human consumption. I will sustain the objection, because it calls for a conclusion.

Q. By Mr. Rolston: I will ask another question: Just relate the conversation, to the best of your recollection. [252]

The Court: That question is all right.

A. On the date in question, approximately October 20th, my associate, Mr. Erhart, and myself called on Bower-Giebel Wholesale with a sample of this Pan O' Butter Fudge. At that time we explained the fudge to Mr. Bower, along with the price and the approximate quantities that we thought we could obtain. Mr. Bower said—

Mr. Wheeler: I object to the conversation as between Mr. Mitchell and Mr. Bower, inasmuch as it does not appear Mr. Ashby was present.

A. How can I tell it in my own way unless I

(Testimony of R. E. Mitchell.)
tell it just the way I am doing. I am just trying to repeat the conversation, as nearly as I can remember.

The Court: That is enough.

Q. By Mr. Rolston: Was Mr. Ashby present during that portion of the conversation?

A. No, sir.

Q. Try and confine the conversation to the time after Mr. Ashby got there.

A. After about an hour or so had passed Mr. Ashby arrived. I don't believe I had ever met Mr. Ashby before. Mr. Bower introduced Mr. Ashby to Mr. Erhart and myself. Mr. Bower then related to Mr. Ashby what Mr. Erhart and I had told him in regard to the fudge.

Mr. Wheeler: May we have the conversation; what he said? [253]

Q. By Mr. Rolston: To the best of your recollection relate some of his statements to Mr. Ashby.

A. As I recall, Mr. Bower said to Mr. Ashby: "I explained to these gentlemen that I knew nothing about fudge; that I was calling someone on the outside for an opinion as to what I should do." Mr. Bower told Mr. Ashby that the fudge cost 50c a pound; that there could be approximately 200,000 pounds of this fudge obtained. Mr. Ashby tasted and sampled the fudge; asked some questions regarding the OPA ceiling concerning it. Mr. Bower then asked Mr. Erhart and myself to explain what we knew regarding the OPA. We told him that we thought the OPA ceiling could be established.

(Testimony of R. E. Mitchell.)

Then Mr. Ashby made some remarks concerning the general condition of the fudge as to how it could be changed to improve the sale of it in his stores. He asked if additional pecans could be placed on the top of it; also, if some pecans could be ground and put throughout the fudge. Either Mr. Erhart or myself answered and said that we thought that could be done. As a recall, he also preferred the fudge to be of a lighter chocolate color. I believe originally the sample was a little darker than Mr. Ashby preferred.

There was also some conversation regarding if a little white doily could be placed on top of each slab. To all of these requests by Mr. Ashby Mr. Erhart and I answered to the [254] best of our knowledge we thought these things could be complied with, and that one of us would go to Chicago in an effort to have the fudge on the basis that he wanted it.

Mr. Bower and Mr. Ashby had a conversation regarding the price that Mr. Ashby would pay for the fudge. After they arrived at the price Mr. Ashby then gave Mr. Bower a purchase order for 28,000 pounds of fudge, and said that he could sell considerably more than that. I believe he remarked that he could sell it as fast as we could ship it. And Mr. Bower then turned to Mr. Erhart and myself and placed an order for 200,000 pounds of fudge; gave me a check for $7,000 as a good-will gesture on his part. We all thanked each other.

(Testimony of R. E. Mitchell.)

That was about the size of it. We were all very happy.

Q. Did you go back to Chicago, Mr. Mitchell?

A. Yes, sir.

Q. You discussed this matter with Mr. Pocius in Chicago? A. Yes, sir.

Q. Subsequent to that the shipments started to come out, did they, to Los Angeles, to Bower-Giebel? A. Will you repeat the question?

Q. Subsequent to your arrival there shipments started to be made to Los Angeles?

A. Not immediately upon my arrival, no. [255]

Q. But a short time thereafter?

A. After considerable conversation over the phone between Mr. Bower and myself shipments finally started.

Q. Did you also airmail a sample of the new formula? A. Mr. Pocius did.

Q. You know that of your knowledge that he did?

A. I did not see him put it on the plane.

The Court: The testimony shows it was received.

Q. By Mr. Rolston: Did you sample the shipments that were made to Los Angeles, in Chicago, before they were made? A. Some of them.

Q. Were the samples you examined, in your opinion, equal if not superior to the sample that was in Mr. Bower's office on that day, October 20th?

A. They were superior to the original sample.

(Testimony of R. E. Mitchell.)

The Court: In that they contained more nuts, is that right?

A. It was a better fudge, your Honor, all the way through. The shipments that were made were on a par with the second sample that was shipped, and there was considerable difference in the eating quality of the two pieces.

Q. When did you have your next conversation with Mr. Ashby, Mr. Mitchell?

A. Well, at one time I tried to sell Mr. Ashby some [256] candies. That had no bearing on the fudge.

The Court: We are not concerned with that.

A. That was the next conversation with Mr. Ashby.

Q. By Mr. Rolston: During that conversation was the fudge mentioned at all?

A. Not to my recollection.

Q. Was that during the month of December?

A. Yes, sir.

Q. That was before Christmas?

A. Yes, sir.

Q. When did you next have a conversation with him after that concerning the fudge?

A. At the time Mr. Erhart and I called on Mr. Ashby. I believe the date was January 12th.

Q. You had a conversation at Sears, Roebuck with Mr. Ashby and Mr. Erhart at that time?

A. Yes, sir.

Q. Did you examine any fudge?

A. Yes, sir.

(Testimony of R. E. Mitchell.)

Q. About how many cases did you examine?

A. 15 or 20.

Q. What was the condition of it?

A. Extremely hard, and a tendency toward molding on part of them. Part of them were in salable condition.

Q. Were any of them still in a moist condition?

A. Do you mean overly moist?

Q. Yes, at that time? A. No, sir.

Q. Of those 15 and some odd cases you examined did you find a high proportion of mold or low, in your opinion?

A. The general percentage of the trouble with the fudge that we inspected at that time was a baked, dried-out, hard condition.

Q. Did you have a conversation with Mr. Ashby at that time concerning the matter?

A. Yes, sir.

Q. During the conversation did you make any such statement as: "I would not have believed it possible if I hadn't seen it with my own eyes"?

A. Yes, sir.

Q. You did make such a statement?

A. Yes, sir.

Q. With relation to what did you make that statement to him?

A. I couldn't understand why the fudge was in that condition.

Q. What would normally cause that condition of the fudge? A. Heat.

(Testimony of R. E. Mitchell.)

Mr. Wheeler: Just a minute. I object to that. No [258] proper foundation for this witness.

Mr. Rolston: I believe I have shown he is an expert.

The Court: I will overrule the objection. Go ahead.

A. I was amazed, because normally if merchandise was kept properly it would not be in that condition in that short period of time. I couldn't understand why it was. I would not have believed it if I hadn't seen it with my own eyes.

Q. By Mr. Rolston: What elements would enter into the fudge becoming in that condition, this particular fudge that you saw at that time, and saw the sample of?

A. If the fudge had been allowed to remain in contact with the air over a long period of time before it was sold that would happen, especially if it was an average, fairly warm, temperature.

Q. Would you say 67 degrees was a fairly warm temperature, so far as preserving fudge was concerned? A. Yes, I would.

Q. Of these cases that you examined, were they 28-pound cases or 18-pound cases, as you recollect?

A. I believe—I am not sure, but I believe there may have been one or two 14-pound slabs, but the majority were 9-pound slabs; two to a case.

Q. During that conversation did Mr. Erhart make the following statement: "In most cases I will argue with the [259] buyer, but here the buyer has a real kick coming"?

(Testimony of R. E. Mitchell.)

A. I don't recall any statement of that kind.

Q. Do you recall any statement during the conversation in which Mr. Erhart made the following statement: "Bower will have to see this, because he will have to stand at least part of the loss"?

A. I don't believe Mr. Erhart said that.

Q. You have no recollection of such statement?

A. I don't recall that statement.

The Court: These boxes you examined had not been opened? You opened them to examine them, isn't that true?

A. No, there were a considerable amount there that had been opened.

Q. Some had been opened? A. Yes.

Q. Did you find the same condition in those that had been exposed to the air as in those that you opened?

A. The ones that had been exposed to the air were all as hard as a brick, whereas the ones that had not been opened, you would find one that was good, and one that was bad.

Q. By Mr. Rolston: Those that had not been opened, there was no sign of mold, was there?

A. I beg your pardon?

Q. Of those that were unopened prior to your opening [260] them there were no signs of mold inside, were there?

A. No; of some that were opened there was a tendency for mold around the nuts.

Q. In your experience with fudge is there any

(Testimony of R. E. Mitchell.)
difference in the handling of an expensive fudge and an inexpensive fudge?

Mr. Wheeler: If your Honor please——

The Court: I don't know that he was qualified as an expert. He is a broker. He is not shown to have been a retailer, or to have had any experience in preserving food.

The Witness: Your Honor, I think I can answer that question in such a way that you can understand it.

The Court: That is not the point. If he has experience along that line they ought to qualify him. So far all I know is that you are a broker.

Q. By Mr. Rolston: In the course of your brokerage business you have had an opportunity to examine the retailing of fudges?

A. It would take a few words to explain just what I mean on that.

The Court: All right.

A. In my type of work, and the type of outlet that I call on in the normal course of events they would not sell a 90-cent fudge. The type of outlet that would sell 90-cent fudge, in the normal course, would be a concern like Albert [261] Sheetz, or Martha Washington, and the type of concern that I would call on would sell that fudge. I used to sell fudge at 8c a pound. That is the type of fudge concern I called on; it wouldn't be 90-cent fudge.

Q. Is 90-cent fudge more perishable than a cheaper fudge? A. Yes, sir.

(Testimony of R. E. Mitchell.)

Q. In your opinion what is the maximum length of time that 90-cent fudge should be kept?

A. It would depend entirely upon whereabouts it was in the store and the condition it was kept under. 90-cent fudge should have cream and butter, and things of that nature in it which we all know are perishable.

Q. Did the Pan O' Butter Fudge the Karmelkorn Kommissary shipped to Los Angeles have cream and butter in it?

A. The ingredient label read that it had cream and butter, if I remember correctly. They couldn't use the word "butter" if it did not have it. It would be against the pure food law.

Mr. Rolston: You may cross-examine.

Cross Examination

By Mr. Wheeler:

Q. Mr. Mitchell, how long have you known Mr. Bower? A. I first met Mr. Bower in 1940.

Q. How long have you done business with Mr. Bower? [262] A. Since that date.

Q. Mr. Bower at the present time, and for some time past, has been one of your major accounts, has he not?

A. He is a good account, if that is what you mean, but I have a lot of other good accounts, too. He is only one of a couple of hundred.

Q. With reference to the volume of purchases Mr. Bower makes, doesn't he purchase a higher volume than most of your customers?

(Testimony of R. E. Mitchell.)

A. I have jobbers within two blocks of him that buy more.

Q. What would be the amount of business that Mr. Bower does with you within a period of a year?

A. I might do $50,000 a year with him; maybe not that high. I would have to take the actual figures from the records.

Q. With reference to the conversation that you had with Mr. Bower's office on October 20th, you stated that there was a discussion with reference to the OPA price ceiling? A. Yes, sir.

Q. Did that discussion involve the prices at which other stores were selling that merchandise?

A. My recollection of that conversation, Mr. Wheeler, was that both Mr. Ashby and Mr. Bower said that they would have no part of it unless it satisfied the requirements of the OPA. [263]

Q. But specifically weren't certain stores and the price at which this fudge was being sold discussed?

A. If I understand you correctly, do you mean was the plants and places where this fudge was being sold discussed?

Q. That is correct.

A. At that time this fudge was not being sold in Los Angeles any place.

Q. But in other areas it was being sold, was it not? A. In other areas?

Q. Yes.

A. Yes, it was being sold in other areas.

(Testimony of R. E. Mitchell.)

Q. As a matter of fact, weren't the prices at which this candy was being sold in other areas mentioned during the period that you were discussing, of the OPA regulation?

A. I would imagine that it was, yes, or it would be normally.

Q. As a matter of fact, wasn't the price at which this candy was being sold at Marshall Field mentioned?

A. I don't believe at that time, no.

Q. At Montgomery Ward, in Denver?

A. Not at that time, no. My recollection is that came up later. That came up after I went to Chicago, when Mr. Ashby and Mr. Bower stopped payment on his check for $7,000, because they were afraid it was not going to satisfy the OPA. At that time the records of other stores [264] were dug up.

Q. And it was being sold at other stores?

A. Yes.

Q. At prices exceeding 89c?

A. It may have been 90c. I don't remember it being over 90c.

Q. As a matter of fact, don't you recall in some of the stores it was being sold at a dollar a pound?

A. I don't recall the figure of a dollar. That's a very poor price.

Q. Either 99c or $1.01?

A. Just a flat dollar is rather an unusual price.

The Court: I don't know why that cent off

(Testimony of R. E. Mitchell.)
means anything. It must be some psychology of selling.

Q. By Mr. Wheeler: Mr. Mitchell, when you state that these boxes that you examined when you went over to see Mr. Ashby on January 12th were opened, just what was their condition? What do you mean by opened?

A. As I recall, Mr. Wheeler, the main reason that I remember that they had been opened had been the manner in which they had been opened. In other words, when they opened the cases, instead of taking a little pains and effort to not wreck the box, they had been very careless in their opening of it. At that time the remark was made to Mr. Ashby when they were opened it would be much nicer to open [265] it in the manner it had been sealed; not like a carton.

Q. How had it been sealed?

A. In corrugated boxes. As you know, they come together, and there is a label pasted over the top of it, and by taking a knife and cutting down that label it opens up, and your carton remains intact.

Q. How had they been opened?

A. They had been opened from the back.

The Court: Somebody just ripped them open?

A. They had been just ripped open, that is correct.

Q. By Mr. Wheeler: You say they were opened from the back?

A. Yes.

(Testimony of R. E. Mitchell.)

Q. As a matter of fact, Mr. Mitchell, don't these boxes open from the back; in other words, aren't these boxes made so that the fold comes together on the back, and not in front, under the label?

A. That may be possible. They weren't opened in such a manner as to preserve the carton.

The Court: In other words, a man could have taken them and opened them and they would not have been noticeable?

A. Yes.

Q. Instead of that, he just ripped it open?

A. That's right. It might have been the top or back; I don't recall. [266]

Q. By Mr. Wheeler: How many cartons that you examined had been opened?

A. Mr. Wheeler, there were a number of cartons lying around the stockroom. I did not count them at that time, and to remember the actual number would be pretty hard. Maybe six or seven or eight; something like that.

Q. As a matter of fact, Mr. Mitchell, weren't the cartons that had been opened stacked together?

A. I really don't remember whether they were or whether they weren't.

Q. You don't recall whether these cartons that had been opened were taken from a particular place, or not? A. I really don't remember.

Q. You did examine a number of cartons that had not been opened? A. Yes, sir.

Q. And there was no question of the sealing of the package in those cases?

(Testimony of R. E. Mitchell.)

A. None whatever.

Q. And among the cases that you did open for the first time there were hard slabs of candy?

A. Yes, I believe there were a few that were as hard as a brick.

Q. Those cases that had been opened that you observed,—was the cover of the box placed over the fudge? [267]

A. Repeat the question again, please.

Q. As to the cartons of candy which you describe as having been opened before you examined them, as to those cartons was there any carton over the fudge?

A. If I understand you correctly, you mean had the boxes that had been opened, had they been put back into the box with their original covers placed on them, as they were before opening?

Q. That is correct. A. No, sir.

Q. Did it have any carton over it?

A. The fudge, as I recall, had been packed with two 9-pound slabs to a carton, and I believe each slab was packed in a very frail, thin cardboard box inside of the original carton, and the ones that had been opened were opened with the top of the outside box gone.

Q. They were still wrapped in waxed papers?

A. No, sir, the paper had been torn off as nearly as possible to see what was inside of them. In other words, they tore them to see what was there, and then set them aside, and would go to another one.

(Testimony of R. E. Mitchell.)

Mr. Wheeler: I have no further questions. [268]

Redirect Examination

By Mr. Rolston:

Q. During the conference with Mr. Ashby did you make any suggestion regarding any cut of price to dispose of the fudge that had not had any mold on it? A. Yes, sir.

Q. Would you relate that portion of the conversation, to the best of your recollection?

A. As we were walking out of the stockroom towards Mr. Ashby's office I suggested to Mr. Ashby that he further reduce his sales price and move the balance of the fudge as rapidly as possible in order to reduce any loss that might occur to the lowest possible amount; Mr. Ashby replied that Sears, Roebuck had already reduced the profit that they were making on the fudge by 20c a pound, and it was not Sears, Roebuck's policy to either sell merchandise at a loss or without a profit. That ended the discussion.

The Court: What do you mean, 69c?

A. Yes, from 89c to 69c, and they weren't interested in taking any further loss, and they would rather throw the whole thing away, or what had to be done. In other words, they had already shown a loss of 20c on their books.

Q. By Mr. Rolston: I believe you were present in Los Angeles, were you not, when Mr. Pocius and Mr. Bower made a certain adjustment of the fudge? [269]

(Testimony of R. E. Mitchell.)

Mr. Wheeler: I object to that as not proper redirect.

The Court: I want to be reasonable. If you overlooked something, go ahead.

A. Yes, sir.

Q. By Mr. Rolston: You were present during the conversation as to that adjustment?

A. Yes, sir.

Q. Do you recall the main factors that were considered in reaching the adjustment?

Mr. Wheeler: If your Honor please——

The Court: I think that is a general conclusion. I think he ought to state the conversation. It is an important conversation, and we ought to hear his version of what he heard of it.

The Witness. Do you want it in my own words?

The Court: Yes, go ahead, if counsel wants it.

Mr. Rolston: Yes.

A. That is kind of hard to do. I will try as near as I can.

The Court: Go ahead.

A. Mr. Bower had wired Pocius stopping shipment.

The Court: And he came out here. Let us start where you met him at Bower's. Let us start with the conversation there.

A. Mr. Pocius and I went into Bower-Giebel, and called [270] on Mr. Bower. Mr. Pocius was interested, and wanted to settle or collect the amounts of the past due invoices, that Mr. Bower had not paid. There was a discussion with Mr.

(Testimony of R. E. Mitchell.)

Bower as to why these invoices had not been paid. Mr. Bower told Mr. Pocius that he had not paid for those invoices because there had been a considerable amount of this fudge sold in this territory; it was now after Christmas, and he had quite a large stock in his warehouse, and the fudge was in a wet, moist, sticky condition; that he did not feel he was in a position to open this fudge and dry it out, so that it would be in a condition to obtain such a high price for the fudge, and as far as he was concerned he would either buy it at a price, or Mr. Pocius could ship it back; he didn't particularly care, one way or the other. And there were also some shipments in transit—three or four shipments in transit, that Mr. Pocius had shipped to Mr. Bower after receiving his cancellation wires; so they arrived at a price on the ones that were in transit, not because of any condition that the fudge might have been in; simply because Mr. Pocius had shipped it without authority. I believe the price on this they arrived at was 32½c, and the condition of the fudge had nothing to do with it. Then they haggled back and forth for a while as to what they were going to pay for the balance of the fudge. Mr. Bower made an offer, as I remember, of 20c a pound, and finally told Mr. Pocius that [271] 20c a pound was his offer, and as I remember his words, he would not pay 20½c a pound for it; to either accept it or ship the fudge back.

Mr. Pocius seemed to think the matter over for some time in his own mind. Finally he agreed to

(Testimony of R. E. Mitchell.)
accept the offer that Mr. Bower had made. By that time it was getting a little late in the day, and Mr. Bower then made the suggestion that this was going to take some time in order to get through these invoices and write checks for each one, and he suggested that Mr. Pocius return the following morning, and that during the evening he would try and have things straightened out so they could clear it up as rapidly as possible the following morning. Mr. Pocius and I left, and we returned the following morning. Mr. Bower had the invoices there, and made a check out for each one of the invoices, which Mr. Pocius received or accepted; and that about covers it, your Honor.

Q. By Mr. Rolston: In your opinion, when you examined the fudge in Mr. Bower's place of business, was that still saleable fudge?

Mr. Wheeler: If your Honor please, I think that assumes a fact not in evidence. I don't recall there has been any examination of the fudge.

A. Yes, Mr. Pocius inspected the fudge in the warehouse that Mr. Bower had. That was the testimony [272] yesterday. Mr. Pocius, Mr. Bower, his son Carlton, the four of us went in the back room. Mr. Bower had the fudge stacked all over the place, and we pulled cases out here and yonder in order for Mr. Pocius to have a good idea as to the condition of the fudge.

There was no tendency whatsoever towards mold. I mean, there was no indication of mold at that time. There was no indication of it being hard

(Testimony of R. E. Mitchell.)

or dry or baked up, but there were numerous cases where the stuff was very wet, very moist. The oil had raised on the top maybe one-eighth of an inch thick, and it was seeping through the cases. Maybe a case was all right, but the darn stuff had leaked through on top, and it was a messy job. It might be that Mr. Bower did not have the time or the help to dry the fudge out. If the fudge had been dried out properly it could have then been sold as a 90-cent fudge; but you couldn't sell a sloppy piece of merchandise for that kind of price.

Mr. Rolston: That is all. Cross examine.

Recross Examination

By Mr. Wheeler:

Q. How many of the cases would you say were examined at that time?

A. Just guessing, Mr. Wheeler, I would say that we probably opened that day maybe 30 or 40 cases. We opened an awful lot of them. [273]

Q. By the Court: You took them from various parts of the warehouse?

A. Yes. In other words, your Honor, Mr. Bower had them stacked at various places all over the warehouse.

Q. He told you he had complaints about the wetness of the merchandise.

A. We all knew that. That had come up before.

Q. By Mr. Wheeler: Do you know how much merchandise Mr. Bower had in the warehouse at that time?

A. I did not count it, no, sir.

Mr. Wheeler: I have no further questions.

HOWARD P. CLARK,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

The Clerk: State your name, please.

The Witness: Howard P. Clark.

Direct Examination

By Mr. Rolston:

Q. Mr. Clark, what is your business or occupation?

A. I am a buyer of job lots, close-out, distressed merchandise or surplus stock the merchants weren't able to get rid of until the war. There is none of that now.

The Court: There is no distressed merchandise?

A. No; the last three years, I have turned from that into the wholesale candy and tobacco business, chewing gum, and so forth; the confectionery business. I have confined my efforts to that. However, I do occasionally get a call from a jobber, broker, manufacturer's representative, warehouses, for something that is not selling right now. The other day a man had 300 cases——

The Court: That is enough. We all wish you well.

Q. By Mr. Rolston: For the last three years, however, you have been concentrating on candy and candy items.

A. That's right.

Q. Did you have any occasion to buy any fudge from the Bower-Giebel Wholesale Company in the early part of 1944?

(Testimony of Howard P. Clark.)

A. 1944—the early part of 1944 I bought from Mr. Bower—say in January, 1944, I bought a lot of fudge from Mr. Bower; approximately 14,000 pounds at one lot.

Q. Did you sell that merchandise?

A. I sold it, every bit.

Q. Was any of it molded?

A. I had no complaints of it. I sold it to reputable markets, such as Von's, Roberts Public Markets, Newberry's 5 and 10 cents. The individual manager of their store bought that fudge, at the instigation of the head buyer.

Q. You sold considerable fudge?

A. To the Newberry stores, in the southwest part of [275] town, Downey, Bellflower, and out in that territory.

Q. Did you buy any of this Pan O' Butter Fudge prior to January 1, 1944?

A. January 24th, when I bought all the lot.

Q. That was bought at a reduced price?

A. Bought at 22c a pound.

Q. Prior to that had you bought some fudge for 55c a pound?

A. I had used a considerable lot, 500 to a 1000 pounds, which I would buy at different times, and sold it.

Q. Several times?

A. I would say several times.

Q. You have sold that at a mark-up?

A. I sold that at my regular mark-up the OPA allows a wholesaler to make.

(Testimony of Howard P. Clark.)

Q. Did you receive any complaints from any of the customers you sold to?

A. I did not. I sold several times.

Q. You sold them other products? They are customers of yours?

A. Yes. I never lose a customer.

Q. Did you have any conversation with Mr. Ashby, of Sears, Roebuck, pertaining to any part of this Pan O' Butter Fudge?

A. Some time after I made the purchase on January 24, [276] 1944 from Mr. Bower. The reason I remember it was after that time was because I was conscious of the fact that he had a quantity of fudge. One evening, after my day's work, on my desk my wife had made a notation on my pad to call Mr. Ashby or Sears, Roebuck, which I did the following morning. I asked Mr. Ashby what he had in mind, and he said he had some fudge. I said, "Well, what's wrong?" To the best of my recollection, Mr. Ashby said, "I over-bought." I said, "Well, I will try and get out and see it. I am pretty busy evenings. Different fellows, and different markets call me up and want to know why I don't bring them merchandise."

Q. During the conversation did Mr. Ashby mention anything about price?

A. He did not, and I never mentioned the price.

Q. Did he say how much fudge he had?

A. He said possibly 10,000 pounds.

(Testimony of Howard P. Clark.)

Q. Did you have another conversation with him shortly after that?

A. To the best of my recollection I did not go out to see Mr. Ashby. I was pretty busy. In a few days Mr. Ashby called me at home, and I told him I was not interested in fudge, on the second call.

Q. Was any price mentioned at that time?

A. He kept on jabbering, and I said I wouldn't give a [277] dime a pound. I said, "I am not interested in it at all at any price."

Mr. Rolston: You may cross-examine.

Cross Examination

By Mr. Wheeler:

Q. Did you examine any of this fudge?

A. Where?

Q. That you bought?

A. From who?

Q. You talked about Pan O' Butter Fudge. Who did you buy it from? Were you talking about what you bought from Mr. Bower?

A. What I bought from Mr. Bower I examined.

Q. What was its condition with reference to moisture on top?

A. If you want to take my definition as to moisture, with the other versions as to moisture which the witnesses have given. My conception of this fudge, when I looked at it, it was not moist. It was syrupy. The syrup came up around the

(Testimony of Howard P. Clark.)
pecans. That was the content. In other words, sticky syrup was oozing out of the fudge.

The Court: Did you notice that condition in the stuff you bought?

A. Oh, yes.

Mr. Wheeler: I have no further questions. [278]

Mr. Rolston: Just one question: Was there any of the fudge you bought which was moldy?

A. I never had any complaints on it. I never saw any mold on it. I sold to different markets at different intervals, after I bought the last bunch from Mr. Bower—Von's Market, and Bellflower bought three or four times from me.

EARL E. BOWER,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

The Clerk: Please state your name.

The Witness: Earl E. Bower.

Direct Examination

By Mr. Rolston:

Q. Mr. Bower, you are a partner in the Bower-Giebel Wholesale Company? A. Yes, sir.

Q. What is the business of the Bower-Giebel Wholesale Company?

A. Wholesale candy and tobacco.

Q. For how long have you been employed in that business? A. Probably 40 years.

(Testimony of Earl E. Bower.)

Q. Have you had much experience with bulk chocolates or [279] fudges?

A. None at all, up until the time of this fudge.

Q. Mr. Bower, you had a phone conversation with Mr. Ashby——

The Court: Do you have difficulty in hearing?

A. A bit.

The Court: Stand closer.

Q. By Mr. Rolston: During the latter part of October did you have any conversation with Mr. Ashby of Sears, Roebuck and Company?

A. Yes, sir.

Q. Regarding fudge? A. Yes, sir.

Q. When was your first conversation with him regarding fudge?

A. October 20th, about 1:30 or 2 in the afternoon.

Q. Was that on the telephone, or in person?

A. I called Mr. Ashby on the telephone.

Q. What was said by you and Mr. Ashby, to the best of your recollection, in that telephone conversation?

A. I said, "Mr. Ashby, I have two gentlemen here with a sample of fudge. It's a very good eating fudge, and appeals to me. Now, we don't know anything about fudge at all, but they tell me that as high as a carload would be available, and I wondered if you would be interested in it." [280] He said, "Yes, I would. I will be down in 15 minutes."

(Testimony of Earl E. Bower.)

Q. And thereafter did you have a further conversation with him that same day?

A. Yes, sir.

Q. Where was this conversation, in your place of business? A. Yes, sir.

Q. Were Mr. Mitchell and Mr. Erhart present?

A. Yes, sir.

Q. Will you relate that conversation to the best of your ability and what the respective parties said, or the substance of the conversation?

A. After introducing Erhart and Mitchell to Mr. Ashby I said, "Well, Mr. Ashby, here is the fudge. Taste it. It looks good to me." I said, "But these fellows want 50c a pound. I never heard of fudge at 50c a pound." I said, "If you buy any of that fudge I would have to charge you 55c for it net. Now, the factory wants 50c a pound, less one per cent, and these men tell me that's f.o.b. Chicago. However, they have led me to understand they could get full freight allowed in a little quantity. The question arose about the OPA, and I said, "Mr. Ashby, these men tell me that Marshall Field has got it in Chicago, selling it at a dollar a pound; The Denver Drygoods Company at another price perhaps. They told me that the OPA's approval could be had." [281] Mr. Ashby talked about a carload. Mr. Erhart and Mr. Mitchell said a carload would not be possible; that they could get a carload perhaps in quantity, but not in one shipment. That the factory is small, and they haven't got the floor space, and they

(Testimony of Earl E. Bower.)
couldn't accumulate a car, but they could ship from day to day, the equivalent of a car.

Mr. Ashby asked if it might not be possible to make these deliveries to his warehouse on South Soto Street, and it was finally thought that as the shipments came into the dock or depot of these transportation companies, that we could control them a little, and divert the shipments as they came in, and thereby get a free delivery; instead of delivering it to our stock, deliver it right to Sears, Roebuck and Company.

Mr. Ashby examined the fudge thoroughly, and expressed a wish of having more nuts, ground nuts, in the body of the fudge. He expressed a wish that he would like to have a little paper doily on top of the fudge, and if I recall correctly he would like to have the fudge a little lighter in color, and whatever there was, Mitchell and Erhart thought these things could be accomplished. Mr. Mitchell said, "I will go to Chicago and follow this fudge through, to get the daily production, get shipments as prompt as possible" and to see that the fudge is carried out as we have just discussed here today. During the conversation Mr. Clark came in, tasted the fudge, and asked some questions; then called me [282] behind the partition behind my chair and said, "Mr. Bower, I would like to order a half carload of that fudge." I said, "Do you mean it?" He said, "Yes." I said, "All right, I will take the order." So I came around

(Testimony of Earl E. Bower.)
the back of the partition and I said, "Mr. Clark just ordered a half a carload of this fudge."

Q. Was that when Mr. Ashby was present?

A. Mr. Ashby was present. So Mr. Ashby spoke up and said, "Mr. Bower, if I give you an order for the fudge, I don't want anybody else to have the fudge until I have had mine." I said, "Mr. Ashby, I think that is very fair. You are the first I called up on the telephone, so if you make a purchase, I consider you have made the first one, and until your order is completed, whatever it may be, there will be no other fudge, so far as I am concerned to deliver to anyone else." After all the discussion and many angles, Mr. Ashby retired to a table near my desk, and wrote out an order for 1000 cases, 28,000 pounds, at 55c net.

Q. I show you Defendant's Exhibit A, and ask you if that is the purchase order that you referred to, that Mr. Ashby wrote it at that time.

A. Yes, I know it by heart.

Q. You put the ink figures on there yourself?

A. Yes; those are the shipments that came through.

Q. And those are your invoice numbers you put on there [283] opposite the shipments?

A. Yes; 10 of them, I think.

Q. How long did that conversation last?

A. It was quite lengthy; at least an hour.

Q. As a matter of fact, part of it was after your closing time, was it not? A. Yes, sir.

(Testimony of Earl E. Bower.)

Q. After that time did you receive any further sample from Chicago?

A. Yes, sir. Mitchell had agreed to send a sample with more nuts in it. From the original conversation I neglected that. And I did, on November 1st, receive a sample by airmail, special delivery.

Q. Did you thereafter have a conversation with Mr. Ashby concerning that sample?

A. He happened to come in a short time after I got the sample.

Q. The same day?

A. He came in the same day.

Q. You had a conversation with him regarding the fudge?

A. Yes. I said, "Ashby, look what I got." Do you want me to repeat that conversation?

Q. Yes.

A. I said, "Here is a sample with the more nuts in it." So we opened it up. I asked him to taste it; he hesitated, [284] and finally I did get him to taste it. He said, "Say, it eats good. We can sell a lot of that fudge." I says, "Look at those stamps. Look what it cost to send it to you, nearly $15 worth." He says, "Mr. Bower, can I have those stamps?" I says, "Sure. I haven't any use for them", so I got a knife and cut the stamps off the container.

Q. Did he take any of that fudge with him?

A. Yes, as I remember, he just took a small piece, not much of a sample; he took a sample with

(Testimony of Earl E. Bower.)
him. He could have had more, but he did not want it.

Q. How large size was the sample that came through the mail?

A. As I remember it, not too large; probably a piece that square.

Mr. Wheeler: Indicating about four inches?

A. Four inches, yes.

Q. By Mr. Rolston: When was your next conversation or talk with Mr. Ashby concerning the fudge, after that occasion?

A. About November 15th, 16th or 17th.

Q. Where did that conversation take place?

A. In my office.

Q. Mr. Ashby presented himself?

A. Yes.

Q. Was anyone else present, that you recall, during the [285] conversation?

A. Oh, I couldn't specifically say who was there at that time. I didn't pay any attention.

Q. What was the subject matter of that conversation?

A. I had received from the Karmelkorn Kommissary a letter claiming that their product met the approval of the OPA, and I gave it to Mr. Ashby; I gave him the original and took a copy.

Q. I show you Defendant's Exhibit B. Is that the letter you are referring to?

A. Yes, that's it. I said, "Mr. Ashby, you have no idea of the detail that's been necessary to complete this transaction up to now." He said, "Bower,

(Testimony of Earl E. Bower.)

when am I going to get some fudge?" I says, "Haven't you gotten some?" He says, "No." I said, "I have had bills for it for a long time; your first shipment came out November 4th. I haven't billed you for the fudge, because I thought I would wait until it arrived. I want to know when it arrives, because I have to pay the freight on it. I have some bills here; but tonight I will bill you for it." But I showed them to him, when they were shipped on the 4th and another on the 8th, whatever they were; so he was satisfied he was going to get some fudge soon.

Q. When was your next conversation with Mr. Ashby concerning fudge? [286]

A. November 29th.

Q. You stated that was at your place of business? A. Yes, sir.

Q. Who was present besides you and Mr. Ashby?

A. He came to my desk—Mr. Rolston, I would have to explain who was present in the conversation?

Q. Yes.

A. At the time he came to my desk he and I were there alone. That answers that question, doesn't it?

Q. Yes, and what was said?

A. "Here, Mr. Bower, I have got something for you."

Q. Did he give you something?

A. He sure did.

(Testimony of Earl E. Bower.)

Q. What was it?

A. I sat down at the desk, and I says, "What is it?" I looked it over and I says, "What is it?" He says, "That's your fudge." I said, "You don't tell me?" So I ripped the bag open, and got it out and I says, "That's funny." I said, "Stella" —calling Mrs. Giebel; I says, "Cart"—calling my son; I said, "Ham", another son—"Come here. Mr. Ashby says this is the fudge he is receiving; the Pan O' Butter Fudge." I said, "Mr. Ashby, in my position, I can't explain it if that's the way it's coming through." Well, he said, "Mr. Bower, that fudge is unsaleable. I can't use it, and I cancelled the order and I stopped payment on your [287] invoices for the fudge."

Mr. Ashby said. "Mr. Bower, have you paid for this fudge?" I says, "You know damn well I have. You was there I think when I gave him a $7,000 check." I says, "What had you in mind, Mr. Ashby, stopping the payment of a check?" I said, "I will get my checkbook and look up the stubs. No doubt there have been remittances, several, since. Maybe we can stop some." So I got the checkbook and looked up the stubs where just a day or two ago, the 26th, I think, we had sent them a check for a couple of thousand dollars and another one on the 26th, and I said, "Yes, we can stop those checks. Shall I stop them, Mr. Ashby?" He said, "Sure."

So I called Josie, my secretary, and I says, "Josie, we will write to the bank and stop pay-

(Testimony of Earl E. Bower.)

ment on some checks. I will get you the checks when we get the letter." I says, "Mr. Ashby, that complicates us, don't it?" He says, "Sure." So we looked at each other and smiled. Mr. Ashby says, "Got anything I can buy, Bower?" I says, "Look around the stockroom with Ham; he will show you."

Q. You had other discussions, and he ordered business after that?

A. I think he went with Ham, my son. We call him Ham. His name is Hamilton. May I have a glass of water? My mouth seems to be getting dry like the fudge, maybe.

Q. Thereafter did you write the Karmelkorn Kommissary [288] concerning that letter?

A. I said, "Mr. Ashby, I will call the factory representative, and have him come out there, and I will report this condition to the factory, and I will stop the payments on those checks."

Q. I show you a copy of a letter dated November 29th addressed to the Karmelkorn Kommissary, 3600 South Halsted Street, Chicago 9.

A. Shall I read it?

Q. Is that the letter you sent? A. Yes.

The Court: You don't have to read it.

Mr. Rolston: I will now offer it into evidence.

The Clerk: Plaintiff's Exhibit No. 6.

Q. By Mr. Rolston: Thereafter you also stopped payment on some four checks totalling over $7.000?

A. Yes, sir.

(Testimony of Earl E. Bower.)

Q. And you called Mr. Erhart to go over there, as the factory representative—that may go out.

Mr. Wheeler: I move that the words "as the factory representative" be stricken as a conclusion.

The Court: His position has already been established by other evidence. It doesn't matter.

Q. By Mr. Rolston: When did you next have a conversation with Mr. Ashby? [289]

A. About 11 o'clock, December 2nd, in the morning.

Q. Was that by telephone, or in person?

A. Mr. Ashby called me on the telephone.

Q. Will you relate the conversation that you had with Mr. Ashby at that time?

A. He said, "Mr. Bower, this is Ashby." —"Oh, yes." —"I have some good news for you." — "What's that?" He says, "I can use the fudge. — "Well, what's happened?" He said, "Mr. Erhart was out here a few days ago and he showed us how to open up the fudge and leave it dry a few hours and it works. We can cut the fudge." I said, "Well, Mr. Ashby, I sure am grateful for all the work and detail you have gone through to try and make this transaction." And Mr. Ashby lipped up and said, "Mr. Bower, what are you trying to do, sell yourself to me?" —"No, Mr. Ashby, but I am really grateful. It is too good to be true." He says, "Don't worry about it. I can use the fudge." I says, "Ashby, what will we do about the two checks we cancelled?" He says, "Withdraw them." I said, "All right."

(Testimony of Earl E. Bower.)

Q. During the conversation did you ask him when your invoices would be paid?

A. No, I don't think I did.

Q. Thereafter did you write a letter to Karmelkorn Kommissary concerning the matter? [290]

A. Yes, I did.

Q. I show you a copy of a letter dated December 2, 1943, addressed to Karmelkorn Kommissary, and ask you whether or not that is the letter you wrote to them? A. Yes.

Mr. Rolston: I offer this letter as our next exhibit.

The Clerk: Plaintiff's 7.

A. Mr. Ashby also in the conversation asked if we had any cigarettes down there. I said, "Not many, Mr. Ashby, but I can probably get you up a few." He says, "I will see you tomorrow."

Q. By Mr. Rolston: Did you see Mr. Ashby the next day?

A. I got down to the store a little bit late the next morning, but when I was there to open up there was our organization and Mr. Ashby were at the door, and they all came in together. I said, "Mr. Ashby, that reminds me. I withdrew the stop-payment on those checks, yesterday, at the bank, but they said I had to confirm it with a letter." I says, "You know, I forgot all about to write that letter." I says, "Josie, make a note of it; write a letter to the bank confirming the withdrawal of my checks yesterday." I said, "Mr. Ashby, now that I have withdrawn the stop-payment on my checks,

(Testimony of Earl E. Bower.)

are you going to withdraw the stop-payment on my invoices?" He says, "You will get some money in a few days." [291] So Mr. Ashby went to a table, which was only about two feet away, and he says, "What cigarettes did you get for me, Bower?" We went over 10 or 12 items. As I recall it, he had a blank piece of paper, and jotted it down. He said, "I am in a hurry this morning. I will take this to the office, and have the girl write them out, and I will put them in the mail for you, and they will follow along."

Q. That was all the conversation you had at that time? A. Yes, sir.

Q. I show you copies of two letters, one dated November 29th, the second one dated December 3, both 1943, to which are attached four checks and ask you if those were the checks you were discussing as having stopped and then withdrew the stop-payment on them?

A. Yes, sir. I want to explain about this letter of December 3rd, to the bank. Josie wrote it that day, because that was the day, but I had withdrawn these checks the day before. So when I took the letter over to the bank on the 3rd, the original letter, I changed the date with the bank's pen and ink and marked it the 2nd, to harmonize with my withdrawal on those checks.

Mr. Rolston: I offer these documents as one exhibit next in order.

The Clerk: Attached and marked 8.

Q. By Mr. Rolston: During the month of De-

(Testimony of Earl E. Bower.)
cember, and [292] prior to Christmas, did you have any further conversation with Mr. Ashby?

A. Yes, some time after that.

Q. Did you see him very often during that time?

A. No. No, I don't recall his being in except once or twice in December, after the 3rd.

Q. On those occasions did you discuss the fudge at all? A. Yes, sir.

Q. When was the next time that you discussed fudge?

A. I don't have available the date; it seems to me about a week before Christmas Mr. Ashby called, and he says, "Mr. Bower, do you know I have darn near lost my job?" —"Why, how is that?" He says, "The big boys of Sears, Roebuck and Company are here. They called me in, and I spent a whole day there." I says, "What about?" He says, "They tell me I have bought too much of this high-priced fudge." I says, "What did you do about it?" He said, "I had to talk like a Dutch uncle. I told them I could sell the fudge." —"Have you still got your job?" —"Oh, yes."

Q. Did he, during that conversation, mention anything about any mold on the fudge?

A. Oh, no.

Q. Did he mention that the fudge was getting dry? A. Oh, no. [293]

Q. When was your next conversation with Mr. Ashby concerning the fudge?

A. As I recall it, he telephoned me.

Q. When was that?

(Testimony of Earl E. Bower.)

A. Some time in December. I haven't the date.

Q. What was said at that time concerning the fudge?

A. He said, "Mr. Bower, in the original order of 28,000 pounds, through delivering whole shipments at a time to our warehouse, there has been some over-shipped over the 28,000 pounds." I says, "Well, we will be glad to pick it up, Mr. Ashby. Where is it?" He says, "It's in the Soto Street warehouse." I says, "How much is it, Mr. Ashby?" He says, "Mr. Bower, I bought, as near as I can tell, 28,000 pounds. There isn't over 10 or 15 pounds difference between the 28,000 and that I would accept." I says, "We will be glad to pick it up."

Q. Thereafter did you pick up that fudge?

A. Oh, yes. I explained to Mr. Ashby, I said, "This is the Christmas season, Mr. Ashby. We are short-handed. I doubt whether I can pick it up before Christmas. Is it in your way?" He says, "Oh, no, but I do want you to pick it up." I says, "We will sure pick it up."

Q. After the first of the year I believe you picked it up?

A. Yes, sir. I will come to that. [294]

Q. I show you two documents purporting to be on the stationery of Sears, Roebuck and Company, one being an invoice form, the other being a retail return, and I will ask you if you got these documents on the day you picked up the merchandise?

A. Yes, sir.

(Testimony of Earl E. Bower.)

Q. That was on—— A. January 11th.

Q. Refreshing your memory from this retail return, do you remember the number of pounds you picked up?

A. About 1928 or '68. Which is it? It is on there.

Q. 1928.

Mr. Rolston: I ask that these two documents be marked together.

The Clerk: Attached and marked Plaintiff's Exhibit 9.

Mr. Wheeler: No objection.

Q. By Mr. Rolston: Did you examine the fudge after you got it back to your warehouse?

A. Yes, sir.

Q. About how many cases did you examine of that 1928 pounds? A. Oh, probably 8 or 10.

Q. Did you find any of it moldy?

A. No, sir. [295]

Q. Did you find any of it was hard, unduly hard? A. No, sir.

Q. Did you sell that fudge? A. Yes, sir.

Q. Did you have complaints from the customers to whom you sold it? A. No, sir.

Q. You sold it after you received it, naturally, after January 11th? A. Yes, sir.

Q. Did you have any further conversation with Mr. Ashby after the last one you have related?

A. Before Christmas?

Q. Yes, since then. A. Yes, sir.

Q. When was the next conversation?

(Testimony of Earl E. Bower.)

A. December 27th.

Q. 1943? A. 1943.

Q. Where was that conversation?

A. In my office.

Q. Who was present at that time?

A. I don't recall specifically.

Q. You and Mr. Ashby? A. Yes, sir.

Q. What was said at that time, to the best of your recollection?

A. Mr. Ashby came in to inquire if we had some cigars, as I recall it. I said, "Mr. Ashby, how did you get along with the fudge for Christmas?" —"Lousily. We have only sold about 10,000 pounds." I said, "What's the matter?" He says, "Mr. Bower, I just can't do anything with these girls; green help; green girls; they don't know anything about fudge, and they just won't spoil their hands to cut that fudge. I just can't do anything with them." He says, "Do you know, with this green new help in my Slauson Street store,—I have some beautiful chocolates; you know how scarce they are." He says, "I had to go down there and pull off my coat and show these girls how to sell chocolates. They are in demand." He says, "I sold them so fast, they just took them and lapped them up." I says, "Mr. Ashby, why don't you pull your coat off and try it on the fudge?" He says, "I will sell them after Christmas."

Q. When was the next time you had a conversation with Mr. Ashby after that?

(Testimony of Earl E. Bower.)

A. As I recall it, he was in the next day, and my son waited on him,—Hamilton.

Q. Did you discuss fudge at that time?

A. I wouldn't say there was any discussion of the fudge. [297]

Q. By yourself? A. No, sir.

Q. When was the next time you discussed fudge with Mr. Ashby? A. January 12, 1944.

Q. Where was that discussion, on the telephone or in perosn? A. No, he called at my office.

Q. Who was present at that time,—anybody besides yourself and Mr. Ashby?

A. There could have been, but I don't recall it.

Q. What occurred?

A. He brought in another specimen of fudge and laid it on my desk, and he says, "Look here, Mr. Bower," he says, and I says, "What; more fudge, Ashby?" He says, "Yes." I says, "My God, that looks as though it's been baked. What happened to it?" —"That's the way I got it." I says, "Where did you get it?" —"One of our stores." I says, "How much of this fudge is in those stores like that?" He says, "All of it." I said, "What temperature do these stores have that's got this fudge?" He says, "About 72 degrees." I said, "Mr. Ashby, it looks to me you are just booked for a lot of trouble. I can't explain it. I don't understand it; but that specimen looks to me as though it's been carried in some heat, because, when it is subjected to [298] heat it becomes gray. The butter fat comes to the surface. That's hard

(Testimony of Earl E. Bower.)

as wood." I said, "Well, I will see if I can get Mr. Erhart and Mr. Mitchell, and have them come over and see now what's the matter." I said, "Mr. Ashby, you are familiar with this whole transaction to date, and it looks here that there is nothing I can do for you on that fudge. I can't be responsible for any neglect, and you know it's your fudge." I called, in his presence, and was able to get Mr. Mitchell, and I explained what was happening here with this hard fudge, and asked him to go over to Mr. Ashby's office and see if he could ascertain what was wrong. He says, "Earl, Mr. Erhart is in San Francisco. He is expected home tonight or tomorrow. I would rather not go over there alone. I would like to have Mr. Erhart with me." So I related it to Mr. Ashby, and it was understood the two would come over. It was understood the two will come over to Mr. Ashby as soon as Mr. Erhart got back.

Q. That was the end of that conversation on that day? A. Yes, sir.

Q. When was your next conversation with Mr. Erhart concerning that fudge?

A. He called me the next day and wanted to know if Erhart got home yet, and I says, "No, I haven't heard from him, but", I says, "I am right onto him, and as quick as that man gets here I will get hold of him and see that these boys go [299] over there."

Q. When was the next conversation?

A. The next day, January 12th.

(Testimony of Earl E. Bower.)

Q. Was that in person or on the telephone?

A. Wait a minute. I did not have a conversation with Ashby on the 12th. These boys went over there. My conversation was with Erhart and Mitchell, I think, on the 12th.

Q. When was the next conversation with Ashby regarding the fudge?

A. I believe it to be about January 17th.

Q. Was that by telephone, or in person?

A. He called me up in the afternoon.

Q. On the telephone?

A. On the telephone.

Q. What did he say, and what did you say at that time?

A. He said, "Mr. Bower, you didn't come up here. Mitchell and Erhart made an appointment for you to come up here", I think it was on Monday, or whenever it was. I said, "I know it, Mr. Ashby. We have just sold a big order for overseas to the Navy. It's an emergency order, 132 cases." I said, "The Navy themselves have come in here with eight carpenters and are preparing those 132 cases for overseas. Other than that I just couldn't get away today. Maybe tomorrow." He says, "I want you to come up and see it." [300]

Q. Was anything else said at that time?

A. No, sir.

Q. When was the next conversation with Mr. Ashby?

A. May I got back to the 10th for just one more thing?

(Testimony of Earl E. Bower.)

Q. Do you mean you forgot something in the conversation? A. Yes, I forgot something.

Q. What else was said?

A. Mr. Ashby said, "Mr. Bower, you haven't picked up that excess fudge over there. We would like to get it out of there." I said, "I have neglected it", and I said, "Mr. Ashby, I will be there the next day in person, and pick up that fudge," which I did.

Q. Now, we come down to the 17th again, Mr. Bower. When was the next conversation after that with Mr. Ashby?

A. He called me again on the telephone and said, "Mr. Bower, aren't you coming up?" I said, "I couldn't get away for some reason," and before, however, the next day, which might have been Tuesday, I had telephoned to the office of Mr. Ashby, and the girl answered, and she tried to locate Mr. Ashby, and said she couldn't. I said, "Will you take this message: I wasn't able to get up there today; the same reason as yesterday." She says, "Yes, I will give him the message", but, however, he called me to remind me that I was to come up, but I couldn't. [301]

Q. Did you go up there the next day?

A. No, sir.

Q. Did you have any further conversation with him prior to receiving that letter from him?

A. He called me up again on the next day about going up there.

Q. You did not go up there?

(Testimony of Earl E. Bower.)

A. No, I said I couldn't go up there, and anyhow, I didn't see how I could do him any good under the circumstances.

Q. During that period of time did you receive any checks in payment from Sears, Roebuck?

A. Oh, yes.

Q. When was the first, if you remember—the first check you received in payment of any fudge invoices?

A. Two or three days after he said he would send me money, and that was on December 3rd. Two or three days after that he sent me $9,100.

Q. When was the next time you received any payment from Sears, Roebuck on account of fudge invoices?

A. I think it was January 15th,—some $10,000.

Q. Thereafter I believe you received a letter from Mr. Ashby?

A. On the 22nd I received one, registered.

Q. I show you Defendant's Exhibit H. Is that the letter you are referring to? [302]

A. Yes, sir.

Q. Is that the letter you received?

A. Yes, sir.

Q. Thereafter did you have any conversations with anyone connected with the Sears, Roebuck organization? A. Yes.

Q. When was your next conversation with anyone connected with the Sears, Roebuck Los Angeles store? A. I think it was February 1st.

Q. With whom was that conversation?

(Testimony of Earl E. Bower.)

A. A man by the name of Theaker called me on the telephone.

Q. Did he identify himself as being connected with Sears, Roebuck?

A. Yes, he said he was superintendent or supervisor.

Q. You talked on the telephone at that time?

A. Yes.

Q. What was said at that time?

A. He said he was superintendent or supervisor, and that he had hoped that he could act as a go-between in this matter with Mr. Ashby and me, in the hope that he could accomplish something, and wondered if I would like to come up to his office the following morning, which we assured him we would be glad to do.

Q. Did you on the following morning see Mr. Theaker? [303]

A. We had an appointment at 9:30, but I did not know which door to go to, so I went to the regular door, and they wouldn't let me in. I just couldn't get through those people, those guards.

Q. That was the regular door for customers to go in?

A. Yes. I should have gone to a particular door, where he had arranged I could have gone through, but I did not know.

Q. Was anyone with you at that time?

A. My son Carlton.

Q. Eventually that morning did you see Mr. Theaker? A. Yes, after 10 o'clock.

(Testimony of Earl E. Bower.)

Q. That was when the store opened?

A. Yes.

Q. Was there anyone else present besides the three of you,—your son, Mr. Theaker and yourself?

A. No.

Q. What was said at that time between you, your son, and Mr. Theaker?

A. Mr. Theaker said, "Mr. Bower", after we introduced ourselves, "Mr. Ashby speaks very highly of you people, and would like to continue business with you, and we think you have high regard for Mr. Ashby." He said, "I have been suffering with a cold, and I haven't been here for several days," and he was eating some licorice that was mentholated; I [304] think they call it Nix or Hix or something, and he said, "I would like to discuss this matter with you, and maybe I can be helpful to get this matter straightened out." I said, "That will be very fine. I have brought my file up here, with all my records, and I would just like to go through this with you." He said all right, and I said, "Let's start with Mr. Ashby's letter to me of January 20th." He said, "All right, I have got a copy of it right here." And he pulled it out of his little brief case.

Q. Do you want the letter while you are talking, Mr. Bower?

A. I don't think so. I said, "Mr. Theaker, in the first place Ashby has written me this letter, and I replied to it and said it doesn't contain the facts." He says, "I have a copy of that letter,

(Testimony of Earl E. Bower.)

too." I says, "Let us review it." I says, "Look in the first paragraph. Mr. Ashby openly acknowledges he has only contacted me twice with all this matter of unsalable fudge—only twice. The first one was November 29th." I said, "Mr. Theaker, now listen. He came to my office with a bagful of soft fudge, like putty, and he told me it was unsalable; that he couldn't use it. He cancelled the order, and he said, 'I'm going to stop payment on your fudge invoices.'" He said, "Have you paid for this fudge?" And I said, "Yes, I have." I said, "What have you got in mind—Mr. Ashby stopping payment on [305] these fudge bills?" He said, "Yes," and I said, "Wait a minute, until I get my checkbook."

The Court: You are repeating the conversation you have already told us about, and that is sufficient for that purpose.

A. Yes; I could have done that, but I did not think of it.

The Court: All right.

Q. By Mr. Rolston: You related the various conversations and transactions you have related here in court? A. Yes, sir.

Q. At that time you also showed him what you had paid for the fudge, and showed him the checks, and what, if anything, did he ask or tell you during the conversation?

A. Well, it finally developed that Mr. Theaker said, "Mr. Bower, the first half of this order was good, and we sold all. It's the second half." He

(Testimony of Earl E. Bower.)
said, "Some of the second half was good, and some was bad." I said, "There are no halves to it. There was only one order being shipped."

Q. Go on.

A. He said, "Do you suppose there were any delays in the transportation from the factory to Los Angeles?" I said, "I thought we got excellent service. As I recall, it's coming through in 10 or 12 days and refrigerated service, too." [306] He says, "I have a record of this shipment." I says, "So have I." I got all the bills. I had them all down, shipment by shipment; one on the 4th reached here the 15th, one on the 8th reached here, and so and so." He says, "I must admit you got good service." I said, "Mr. Theaker, I haven't seen this fudge. I would like to see it." He says, "You can see it." "Where is it?" "In the Soto Street warehouse." He took me down there.

Q. Was your son with you at that time also?

A. Yes, sir.

Q. The three of you? A. Yes, sir.

Q. He showed you the fudge?

A. Another gentleman went with us from the office to the warehouse.

Q. Was that Mr. Arnold?

A. I think it was him.

Q. And the four of you examined the fudge?

A. Yes, sir.

Q. What was said between yourself, Mr. Theaker, your son and Mr. Arnold at that time?

A. I did not get that.

(Testimony of Earl E. Bower.)

Q. What was said at that time between yourself, your son, Mr. Theaker and Mr. Arnold, if anything?

A. He had to get the key, or combination, or something, [307] to the warehouse. When I got a glimpse of the room, and saw these 28-pound boxes, I recalled that Mr. Theaker said the first half was good, and they sold it all. I said, "Mr. Theaker, there's some of the first three shipments that you said was good, and you sold them all."

Q. Diverting a moment, do you mean the first three shipments of 28-pound cases?

A. The first three shipments of 28-pound cases.

Q. Subsequent shipments?

A. I think they also had some 18-pound.

Q. What else was said in the warehouse stockroom?

A. We opened up some of the fudge, as I recall it, and there was some cases that had been opened, but I wanted to open some fresh ones, and they appeared to be dry and hard.

Q. Did you see any soft fudge at that time?

A. I don't recall seeing any soft fudge.

Q. What else was said, if anything?

A. Well, Mr. Theaker says, "We should take that up with the factory. They should give us an adjustment."

Q. What did you say, if anything?

A. We then left, and went to this Mr. Arnold's office in the warehouse, and that's the first time we learned what Mr. Theaker's idea was.

(Testimony of Earl E. Bower.)

Q. What did he say?

A. He said the factory should receive all that fudge [308] back, 9700 pounds; that this should be sent back to the factory and made over, and then—I don't know whether 25 per cent or 50 per cent more should be sent back with this fudge in addition to the amount of fudge, the 10,000 pounds, which was worked over, and there was to be 50 per cent more; he wanted 15,000 pounds.

Q. What did you say, if anything, to that?

A. I had very little to say. My son got into it.

Q. What did he say, to the best of your recollection?

A. He wanted to know if I wouldn't report this to the factory, and I said yes.

Q. I think you misunderstood the question. My question is what did your son say, if anything?

A. My son says, "Why, Theaker, you want the cake and eat it too. You might as well hit your head on the wall. You will get that just as quick. No factory would make all that fudge good and then give you an additional 50 per cent allowance." Carlton says, "That is salvage fudge and if you get a shipment from the factory, it is brand new. That isn't salvage." Theaker says, "The customers don't know it."

Q. What, if anything, was said at that time?

A. Theaker asked me if I would talk to the people back in Chicago, and I said I would. He also asked me to send a copy of my letter or my report of No-

(Testimony of Earl E. Bower.)

vember 29th, when Mr. [309] Ashby brought in the specimen of wet fudge in the bag.

Q. That is the letter introduced in evidence?

A. Yes, sir.

Q. Did you at that time advise anybody connected with the factory?

A. Knowing that Mr. Erhart was in Chicago, I wired Mr. Erhart, their representative.

Q. I show you what purports to be a copy of a telegram dated February 2nd, addressed: Mr. Alphonse Erhart, Chicago, Illinois. A. Yes.

Q. That is a copy of the telegram?

A. Yes; I sent Mr. Theaker a copy.

Q. This is a copy of your letter to Mr. Theaker of February 2, 1944?

A. Let me know what that is. Yes, that's right.

Mr. Rolston: I suggest that these two be marked together as one exhibit.

The Clerk: 10.

Q. I think that finishes the conversation of February 2nd, doesn't it? A. That's right.

(Whereupon an adjournment was taken until 10 o'clock a.m. of the following day, Thursday, January 11, 1945.) [310]

Los Angeles, California, Thursday,

January 11, 1945, 10 a. m.

EARL E. BOWER,

recalled.

Further Direct Examination

By Mr. Rolston:

Q. Mr. Bower, yesterday I believe we had just started the relation of what occurred with Mr. Theaker, on or about February 2, 1944. When was your next contact with anyone concerning Sears-Roebuck and Company, concerning the fudge?

A. With Mr. Theaker?

The Court: With anybody.

A. As I recall it, it was about the 11th of February.

Q. By Mr. Rolston: With Mr. Theaker?

A. About the 11th of February, yes.

Q. Was that over the telephone, or in person?

A. Telephone.

Q. Did you call Mr. Theaker, or did he call you?

A. Mr. Theaker called me.

Q. What was said at that time on the telephone?

A. Mr. Theaker said he had received a letter from Sears-Roebuck and Company, Chicago, that they had contacted somebody by the name of O'Brien, and O'Brien had advised them that we had received a settlement on Sears' fudge, amounting to several thousands of dollars. He said, "Do you want me to read the letter?" I said, "Yes," which he [311] did. I said, "O'Brien? Who is

(Testimony of Earl E. Bower.)
he?" He says, "He is with the Karmelkorn Kommissary." I says, "I never heard of him, and as far as receiving an adjustment of Sears' fudge, that isn't so."

Q. Was that the end of that conversation?

A. That is all I can recall.

Q. Did you have any further conversation with him that day? A. Yes, sir.

Q. Was that in person, or again by telephone?

A. Yes, sir.

Q. Which was it? A. By telephone.

Q. By telephone again? A. Yes, sir.

Q. Did you call him, or did he call you?

A. I called him.

Q. It was later in the day? A. Yes, sir.

Q. What was said at that time?

A. I said, "Mr. Theaker, I have just called Bob Mitchell to find out who this man O'Brien was. As I understand it, he was a sales manager for a salad dressing company in Chicago, going under a fictitious name. His name is Squiers, and not O'Brien." I said, "Why don't you contact [312] the Karmelkorn Company?" I said, "As I understand it, they have concessions in Sears' stores in Chicago, and you should be able to see them in one of their own stores." He says, "I will take it up with them right away by airmail."

Q. Was that the end of that conversation?

A. As I recall it, yes.

Q. Was there any further conversation that day? A. Not that I recall.

(Testimony of Earl E. Bower.)

Q. On or about that day did you write a letter to Mr. Theaker? A. On February 11th?

Q. Yes. I will show you what purports to be a copy of a letter dated February 11th, addressed to Mr. Theaker. Did you write that letter?

A. I wrote that letter, and it's on the 11th.

Q. I find that letter attached to a sheet of paper bearing figures, numbers, and words.

A. I was under the impression that this took place later in February. I don't recall whether the man asked me on the telephone—he asked me to make out all the bills that we had received for the shipments of Sears' fudge—10 in number, I think; and how we paid for them, and whether by our check. So I made them out, with my check number, and how we paid them, and the net amount the factory would get. The 11th date now is confusing to me, because I [313] don't just recall how the thing came up.

Q. You prepared this in your own handwriting?

A. Yes, sir.

Q. You mailed two copies of it to Mr. Theaker together with the original of this letter?

A. Yes.

Mr. Rolston: I offer this letter and the document attached as one exhibit, Plaintiff's next in order.

The Court: It may be received.

The Clerk: 11.

Q. Did you have any further contact with anyone connected with Sears-Roebuck and Company?

(Testimony of Earl E. Bower.)

A. After that?

Q. After that, yes, after you wrote this letter.

A. Yes, I did.

Q. Was that in person, or by telephone?

A. By telephone.

Q. When, about, was that, to the best of your recollection?

A. I thought that was about the 20th or 23rd of February.

Q. Did you call Mr. Theaker, or did Mr. Theaker call you?

A. Mr. Theaker called me by telephone.

Q. What was said at that telephone conversation? [314]

A. He said he had a letter that he received from the Chicago office again with more details; that it was quite a lengthy letter, but much to much to go over, relative to the settlement or adjustment from the Karmelkorn company, and he wanted to know if it would put me out to come over there. I told him I would be glad to come over, and I would bring the file covering these adjustments.

Q. That was the end of that telephone conversation? A. Practically.

Q. Did you thereafter go over to see Mr. Theaker, in person? A. Yes, sir.

Q. Did anyone go with you?

A. My son, Carlton.

Q. Was that later in the same day?

A. As I recall it, we went right up.

Q. You took the records with you?

(Testimony of Earl E. Bower.)

A. Yes, sir.

Q. I show you Plaintiff's Exhibit, which were all introduced as one exhibit, 4, with various subletters, which appear to be invoices from the Karmelkorn Company, together with checks paying the amount of the invoice. Were these the documents you brought with you and showed to Mr. Theaker at that time? A. Yes. [315]

Q. You went over these in detail with him?

A. Yes.

Q. What else was said during the conversation besides the explanation of the documents?

A. I explained to him that it showed 30c a pound adjustment on the fudge, but that wasn't so. I said, "The adjustment on this fudge was less than 30c f.o.b. Chicago, and on these bills originally I was allowed the freight, but being adjusted as f.o.b. Chicago I absorbed the freight which added about 3c a pound to my cost, so I had a cost of about 23c, instead of 20c, as appears."

Q. What else was said at that conversation with Mr. Theaker?

A. He read the letter he had received from them. It was just this O'Brien again.

The Court: O'Brien kind of got your goat.

A. I said, "I can't just understand why these men back there are consulting me." I stated, "You might as well take the janitor. Why don't you put somebody on there that is competent, or go to the Karmelkorn Company."

Q. Give the best of your recollection of the

(Testimony of Earl E. Bower.)

entire summary of that conversation with Mr. Theaker at that time.

A. He says, "I will take it up with them again."

Q. During that conversation did he ask you to take it up with the factory? [316]

A. Mr. Theaker said, "Mr. Bower, if you will call Mr. Pocius direct, and ask him if he would consider an adjustment on their fudge, Sears-Roebuck and Company would consider that the Bower-Giebel Company did all they could in Sears-Roebuck's behalf."

A. Did you call the Karmelkorn Kommissary for Sears?

A. By long distance telephone. Not at Sears. At my office.

Q. Did you have any further contact with Mr. Theaker, Mr. Ashby, or anyone connected with Sears, after that? A. Yes, sir.

Q. When was that?

A. I don't know. It seemed quite a long time after that. I don't know about the date; maybe a week or 10 days; maybe two weeks.

Q. Do you recall who it was with?

A. Mr. Theaker called me on the telephone.

Q. Give that conversation.

A. He said he had a long letter that was not very encouraging for me, and he would like to read it to me, which he did. As he read it I felt it didn't apply to me. I said, "Mr. Theaker, there is no need discussing this matter any further. I will

(Testimony of Earl E. Bower.)

just attach the account." And I hung up the phone in his ear.

Q. That was the last contact you had in person with [317] anyone connected with Sears?

A. That I recall.

Q. Going back a bit, I show you two copies of two letters under date of January 22, 1944, and ask you if you wrote those two letters to Sears-Roebuck at or about the time you received a letter from Mr. Ashby dated January 20th?

A. Yes, sir, I wrote these letters.

Mr. Rolston: I ask that these two letters be introduced.

The Clerk: Attached and marked Plaintiff's Exhibit 12.

Q. By Mr. Rolston: Mr. Bower, just prior to this trial I asked you to get all the purchase orders Sears-Roebuck and Company placed with you after this matter started after October 20th, did I not.

A. Their purchase orders?

Q. Yes. A. Yes, sir.

Q. I show you 12 purchase orders, all appearing on the stationery of Sears-Roebuck and Company, the first of which is dated November 29, 1943, the last of which is dated January 12, 1944. Are those the sum total of all the purchase orders you received between those dates?

A. That's all that I was able to find. There could have been one misplaced, or more.

The Court: They don't come and pick anything up? [318]

(Testimony of Earl E. Bower.)

A. Sears-Roebuck and Company, at my warehouse?

Q. Yes. A. Yes, they do.

Q. They would give these purchase orders?

A. Not without the purchase orders.

Q. They wouldn't do any cash-and-carry business? A. No.

Mr. Rolston: I ask that these purchase orders be introduced as one exhibit.

The Clerk: 13.

Q. By Mr. Rolston: Going back a bit, Mr. Bower, you received quite a bit of fudge, did you not, after Sears had received their 28,000 or 29,000 pounds or so? A. Yes, sir.

Q. Mr. Pocius came out on or about December 30th of that year, as I recall? A. Yes, sir.

Q. Did he examine much of the fudge that was on hand on that occasion? A. Yes, sir.

Q. About how many cases, do you recall?

A. Quite a number. We had many different shipments we got in, and we went from shipment to shipment.

Q. In any of your examinations did you discover any mold whatsoever on any fudge? [319]

A. Oh, no.

Q. You sold all of the fudge that you had on hand? A. Yes, sir.

Q. Did you have any complaints from any person claiming any mold? A. No, sir.

Q. Did you have any complaints from any person at all that you sold to? A. No, sir.

(Testimony of Earl E. Bower.)

Q. You sold some of it to such stores as Bullock's? A. Yes, sir.

Q. In their candy department?

A. Yes, and several others.

Q. The Thrifty Drug Store?

A. Yes, and the Broadway Store.

Q. Newberry's?

A. Yes, sir; many of their stores.

Q. And many other customers?

A. Many others.

Q. You had no complaints of any type or description? A. No, sir.

Q. As far as you know you have never seen any mold on any fudge you have received in your warehouse? A. That's right.

Q. On your adjustment with Mr. Pocius, Mr. Bower, was [320] there any discussion of a complete settlement of all fudge or just a settlement of the fudge that was on your floor?

A. That was on the floor, and in transit.

Mr. Rolston: You may cross-examine.

Cross Examination

By Mr. Wheeler:

Q. How much fudge had you sold prior to the time that Mr. Pocius came out there, Mr. Bower?

A. Including Sears-Roebuck?

Q. Including Sears-Roebuck.

A. I really couldn't answer the question. I don't know. Quite a little.

(Testimony of Earl E. Bower.)

Q. How much did you sell after Mr. Pocius was out here?

A. I had a lot on hand. I probably sold a thousand or 1500 cases.

The Court: It was mostly cigarettes?

Mr. Rolston: That was a year ago. They weren't quite as short on cigarettes.

The Court: Go ahead.

Mr. Rolston: If I may make a statement: These were introduced mainly as corroboration of dates of purchases and course of conduct.

The Court: I understand that.

Q. By Mr. Wheeler: When did you cancel the checks that you had sent to Mr. Pocius in the month of December, 1943? [321]

A. I don't remember the date exactly, but about December 14th.

Q. When did you receive your first shipment of fudge after the Sears-Roebuck and Company fudge?

A. Around December 10th.

Q. Going back to your conversation with Mr. Ashby, in which you said to him, "My God, you saw me hand Erhart or Mitchell the $7,000 check for the initial payment on the goods", do you recall saying that? A. I may have said that.

Q. As a matter of fact, did you hand Mr. Mitchell the $7,000 check at the time of the initial purchase, on October 20th?

A. I don't think I did.

Q. As a matter of fact, you didn't hand it to him at all on that date, is that correct?

(Testimony of Earl E. Bower.)

A. Yes, we handed it to him that day.

Q. Showing you a letter of October 21, 1943, addressed to R. M. McClure Company, I will ask you if you wrote that letter?

A. Yes, I wrote the letter.

Q. Will you read the fifth paragraph of that letter? A. Yes, sir.

Q. Will you read it aloud?

A. Yes, sir: "Herewith attached, please find our [322] check for seven thousand dollars as part payment of the above shipment in advance as good faith. The balance of the shipment will be paid instantly on receipt of the original bill of lading marked prepaid, and covering shipment complete of twenty-eight thousand lbs."

Q. So, as a matter of fact, you sent the letter by mail on October 21st, did you not?

A. I do not recall it, nor the date. My understanding is we handed Mr. Mitchell the check.

Mr. Wheeler: All right. I offer in evidence the letter.

Mr. Rolston: No objection.

The Clerk: That will be Defendant's LL.

Q. By Mr. Wheeler: You subsequently placed another order with the Karmelkorn Kommissary covering this fudge, did you not, Mr. Bower?

A. Yes, sir.

Q. And that order is date October 30th?

A. That is correct.

Q. And is this order in your handwriting?

A. Yes, sir.

(Testimony of Earl E. Bower.)

Mr. Wheeler: I offer in evidence this order, purchase order dated October 30, 1943, addressed to Robert E. Mitchell, care Karmelkorn Kommissary.

The Clerk: MM. [323]

Q. By Mr. Wheeler: Now, Mr. Bower, with reference to your telephone conversation of December 2nd, with Mr. Ashby, do you recall that Mr. Ashby stated that he was satisfied with the fudge?

A. No, I don't recall that.

Q. What did he advise you?

A. He said he could use it.

Q. On page 14, lines 5, 6 and 7, showing you a copy of your deposition, and particularly lines 5, 6 and 7. A. Yes, sir, I said that.

Q. Which is to this effect:

"Q. Your recollection is Mr. Ashby said that he was satisfied with the fudge? A. Yes, sir."

As a matter of fact, Mr. Bower, Mr. Ashby told you that he was not satisfied with the fudge, in this telephone conversation, did he not?

A. No, sir. He did say this—if you wish me to repeat it.

Q. Yes, if you will repeat the conversation.

A. He said, "The fudge is awfully messy, and after I get rid of this fudge I don't want to hear the name of fudge anymore."

Q. Is that all he said?

A. That is all I recall. [324]

Q. I show you Plaintiff's Exhibit 7, and par-

(Testimony of Earl E. Bower.)

ticularly paragraph 4 on page 1 of that letter. Did you write that letter, and write that paragraph?

A. Yes, sir.

Q. So that Mr. Ashby did tell you that he was dissatisfied with the fudge, and that he took it on Mr. Erhart's explanation.

Mr. Rolston: Just a minute. I am going to object to this. The letter speaks for itself.

The Court: It is permissible cross examination. Go ahead.

Q. By Mr. Wheeler: Didn't he?

A. I don't recall his saying he was dissatisfied with that fudge.

Q. You did write this letter, in which you stated that Sears-Roebuck and Company called the writer 10 minutes ago to advise us that they are again accepting shipments of fudge, and are entering your invoices for payment in due course. However, they explain they were not satisfied with the fudge, but had accepted Mr. Erhart's explanation and adjustment. A. I wrote the letter.

Q. You knew, on December 10th or December 11th, Mr. Bower, that Mr. Ashby was not satisfied with the fudge, did you not? A. Yes, sir.

Q. As a matter of fact, you wrote to the Karmelkorn on or about December 10th, didn't you?

A. That's my handwriting.

Q. You did send this to the Karmelkorn people?

A. Evidently I did.

Q. In which you stated: We just received our first fudge. Looks O.K. Am selling hell out of it.

(Testimony of Earl E. Bower.)

Please rush another 40,000 lbs. We like, whether Ashby does or not. Signed Earl E. Bower.

A. That's right.

Q. So that Mr. Ashby was advising you he was dissatisfied with the fudge during that period of time, was he not?

A. I didn't realize it, no, sir.

Q. Until you read this letter?

Mr. Rolston: To which I am going to object as argumentative.

The Court: I think this particular question is argumentative. The letter speaks for itself. It is evident from the letter that Ashby was expressing some dissatisfaction.

Q. By Mr. Wheeler: Mr. Bower, you had some telephone conversation with Mr. Squiers, of Karmelkorn, in December, 1943, did you not?

A. Yes, I did. [326]

Q. And you had that prior to Christmas in December, 1943, did you not? A. Yes, sir.

Q. And in this conversation you told Mr. Squiers that Sears, Roebuck and Company would make a claim for the fudge, did you not?

A. I don't recall it.

Q. And Mr. Squiers told you that Karmelkorn would take care of any claim that Sears, Roebuck would make concerning defective fudge?

A. I recall that, yes, sir.

Q. He made that prior to Christmas?

A. As I recall it, he did.

(Testimony of Earl E. Bower.)

Q. So that there was a discussion with Mr. Squiers prior to Christmas concerning the defective Sears, Roebuck and Company fudge?

A. No, sir. I had cancelled my order for the fudge. I called him directly with reference to my cancellation. I wanted to return the goods.

Q. That's correct; you wanted to return the goods? A. Yes, sir.

Q. And in the discussion with Mr. Squiers the Sears, Roebuck and Company fudge was specifically mentioned as being defective?

A. No. He volunteered that in discussing our fudge [327] that I wanted returned. I says, "We will make the fudge good to anybody, including Sears, Roebuck, down there."

Q. So, at the time of that discussion, you knew that Sears, Roebuck and Company was going to make claim for defective fudge.

Mr. Rolston: To which I am going to object as argumentative, and it is not the fact, as disclosed by the conversations. It is Mr. Wheeler's conclusion of what that conversation means.

The Court: It is rather argumentative. I think he has given us his best recollection of what took place, and the rest is argumentative. I will sustain the objection.

Q. By Mr. Wheeler: You recall having several telephone conversation with Mr. Theaker in the latter part of January and early part of February, do you not? A. I think they were in February.

(Testimony of Earl E. Bower.)

Q. As a matter of fact, wasn't the first conversation prior to the 1st of February?

A. It could have been, but I don't recall it.

Q. And didn't you tell Mr. Theaker in the first conversation that you had with him, prior to the 1st of February, that you believed you could get an adjustment from the factory; and Mr. Theaker told you that at that time the factory had advised him that you had received an adjustment for all of the fudge, and you replied, "He knows different," [328] referring to Pocius or Squiers, "they called me on the long distance telephone between Christmas and New Year's. I have a record of the man's name. He is not connected with Karmelkorn. We raised the dickens that they shipped more fudge after we cancelled the shipment, and they continued to ship. I told them we couldn't sell a dollar a pound fudge after Christmas. We have been selling fudge at 89c, but it was not moving fast enough for the quantities that we got. You haven't anything to worry about. Sears have been complaining, and he says, 'We will make Sears' fudge good, too.' "

Mr. Rolston: May I have the question back?

(Question read by the reporter.)

A. I don't recall it.

Mr. Rolston: I object to the question as compound. Can you answer the question, Mr. Bower?

A. I just don't recall that conversation.

Q. By Mr. Wheeler: And on February 1st, in a telephone conversation that you had with Mr. Theaker, didn't you make the following statement:

(Testimony of Earl E. Bower.)
"That man in Chicago assured me that he would make your fudge good. Squiers, he's the sales manager for salad dressing, and Victor of Karmelkorn, they were in together on this fudge. If you have a way of communicating with your boys in Chicago, remind them that he positively assured me, with a long distance telephone call, [329] they would make any fudge good that Sears had. He called just before Christmas.

Theaker said: "That adjustment. Does this candy have any salvage value?

Bower: "I haven't seen that fudge.

Theaker: "You will see it tomorrow morning.

Bower: "O. K.

Theaker: "I'll get this wire off. I'll have a reply by tomorrow afternoon. Inasmuch as they have had their dealing with you, I am going to advise them to make the settlement with you.

Bower: "They should make that direct with you. They can use the sugar content out of it. Maybe Sears, Roebuck can handle it in Chicago; save the transportation. But if we will get the 9,000 pounds of good fudge, we will accomplish something. They are not out anything but their labor. Mr. Squiers assured me they would make good any defective fudge that Sears Company had. He is a manager of Durkee mayonnaise. Victor Pocius flew here. He has a concession in your seven or eight stores. He sold that fudge in your store a good many years. He appeared to be a very fine man. I thought everything was O. K. We reached

(Testimony of Earl E. Bower.)
the agreement. Ashby said he could use it or I would have been glad to cover over and see him."

Then at the conclusion did you not say: "Squiers seems [330] to have the authority. He is the man who positively assured me that he would make any fudge good to you."

Do you recall that conversation?

A. I recall some of it. I told Mr. Theaker of the assurance by Mr. Squiers to myself over the long distance telephone that they would make any fudge good, including Sears, Roebuck, if they had some.

Q. That is correct. As a matter of fact, you saw Mr. Ashby several times during the Christmas holidays, did you not?

Mr. Rolston: By that, do you mean between Christmas and New Year's?

Mr. Wheeler: Between Christmas and New Year's.

A. I remember seeing him January 27th, and probably 28th.

Q. December 27th?

A. December 27th and 28th.

Q. Did you mention to him at that time that Mr. Pocius was coming to Los Angeles, or was in Los Angeles, to make a settlement?

A. I didn't even know Pocius was coming. He hadn't got here yet.

Q. When did he arrive?

A. I don't know when he arrived, but when he walked in our store I think it was the 29th. [331]

(Testimony of Earl E. Bower.)

Q. You did not know he was coming until he walked into your store? A. That's right.

Q. You did not call Mr. Ashby when he was here?

A. No, Ashby had not been complaining.

Q. He was in a day or two before?

A. He did not say anything, that he had some distressed fudge.

Q. By the Court: Mr. Bower, didn't Mr. Pocius, in this long distance telephone conversation, tell you he was coming out from Chicago personally? A. No, sir.

Q. He did not? A. No, sir.

Q. By Mr. Wheeler: In your direct examination, Mr. Bower, you testified that it was on the occasion of December 27th, in your office, that Mr. Ashby told you that he was having difficulty with the fudge, and that it was because of the green help; that they did not like to handle the candy; that he couldn't do anything with them about it. Is that correct? A. Yes, sir.

Q. You further testified that you did not have any conversations with Mr. Ashby between the 3rd or 4th of December and the 27th of December?

A. With one or two exceptions.

Q. As a matter of fact, the conversation which you stated occurred on December 27th occurred prior to Christmas, did it not, with reference to the difficulties he was having with the fudge, and green help, and so forth?

A. I thought it was on the 27th.

(Testimony of Earl E. Bower.)

Q. On page 18, line 9—— A. Line 9?

Q. Yes. A. Yes, sir.

Q. Read the next two lines. A. Yes, sir.

Q. Perhaps you had better read through on page 19.

A. Do you mean go on with it?

Q. Yes. A. Shall I read it aloud?

The Court: No, read it to yourself.

A. Yes, sir.

Mr. Wheeler: Is it stipulated that the deposition will show the following testimony:——

Mr. Rolston: Yes, I stipulate that that portion will show that he related in his deposition that the conversation was prior to Christmas to his best recollection.

Mr. Wheeler: This is the deposition, page 18, commencing line 9: [333]

"Q. After that morning, when he gave you the cigarette order, and prior to Christmas, did you have any other conversation with him?

"A. Yes, he came in and complained that he couldn't get the girls to cut the fudge. He said, 'It's all the new help, new girls; I couldn't get them to function.' He said, 'It's terrible. The stuff is just laying there.' He said he hasn't got the support. If he had his old crew he could do something about it.

"Q. When did this conversation occur?

"A. In December, before Christmas.

"Q. Do you remember more specifically when it occurred? A. No.

(Testimony of Earl E. Bower.)

"Q. Do you recall the time of day?

"A. No.

"Q. Do you recall how long before Christmas it was? A. No.

"Q. Was there anything else said during the conversation?

"A. There could have been. I don't recall."

Mr. Wheeler: I have no further questions.

Mr. Rolston: That is all. I will call Mr. Saxe under Section 2055, of the Accounts Payable Department of Sears, Roebuck.

The Court: We don't have 2055. [334]

RAY SAXE,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

The Clerk: What is your name?

The Witness: Ray Saxe.

Direct Examination

By Mr. Rolston:

Q. You are in charge of accounts payable at Sears, Roebuck and Company?

A. That's right.

Q. You were so employed approximately a year ago, during the months of November, December, and January a year ago? A. That's right.

Q. Your counsel, Mr. Wheeler, has just given me this file——

(Testimony of Ray Saxe.)

The Court: I don't presume there is any objection to his being examined, but, strictly speaking, he does not come within the section. The federal statute is much narrower than the State statute. He must be the managing agent. The manager of a department is not the managing agent. I presume he will tell the truth, if you call him, or someone else.

Mr. Rolston: I understand.

The Court: I want it understood. [335]

Q. By Mr. Rolston: You are familiar with the papers in this folder counsel gave me?

A. Yes.

Q. Did you bring with you your checks A108-592 and A125670? A. I did not.

Q. You did not bring those checks?

A. No, sir.

Mr. Wheeler: Not the checks. He has the record card of it.

A. Which numbers are they?

Q. By Mr. Rolston: I see here attached to your copy of voucher A125670, the invoices of Bower-Giebel Wholesale Company, which it covers, is that right? A. That's right.

Q. Can you tell me what date that check bears? It is down here January 13, 1944.

A. That's right.

Q. Check for $10,274.96, is that correct?

A. That is correct.

Q. And among the invoices is invoice, Bower-Giebel, under date of November 30, 1943, 226 cases

(Testimony of Ray Saxe.)

Pan O' Butter Fudge, the total amount of the invoice being $2,237.40, is that correct?

A. That's right. [336]

Q. That invoice was paid by that check?

A. Yes, sir.

Q. Another invoice included in the payment of that check, the next invoice, Bower-Giebel, under date November 30, 1943, 230 cases Pan O' Butter Chocolate Pecan Fudge, 18 pounds to the case, total amount of money paid on this invoice being $2,277.00, is that correct?

A. That is correct, sir.

Q. Also paid by the same check is invoice under date of November 30, 1943, of Bower-Giebel, 230 cases, being another payment of $2,277.00—230 cases of Pan O' Butter Fudge.

A. That is right, sir.

Q. Also paid by that check is another invoice under date of November 30th for, I believe it is, 170 cases. A. Yes.

Q. 170 cases 18 lb. each Pan O' Butter Chocolate Pecan Fudge, the net price paid being $1,683.00. That was paid by check? A. That is right.

Q. Another invoice paid by the same check, dated November 30th, calling for 73 cases 18 pounds each, Pan O' Butter Chocolate Pecan Fudge, net price being $722.70. A. That is right.

Q. All of these invoices were paid by the check bearing [337] that date?

A. That's right, sir.

Mr. Rolston: I would like to offer this as one

(Testimony of Ray Saxe.)

exhibit. I know Sears like to keep their original records, and there will be no objection to their return after the termination of the case.

The Court: You may substitute photostats.

Mr. Rolston: This copy of voucher and check No. A125670, under date of January 13, 1944, together with the original invoices of Bower-Giebel, attached thereto, is offered.

The Clerk: That will be Plaintiff's Exhibit 14.

Mr. Rolston: I will also have marked at this time copy of voucher No. A108592, under date of December 6, 1943.

The Clerk: 15.

Q. By Mr. Rolston: Examine Plaintiff's No. 15, which is a copy of check voucher No. A108592, under date of December 6, 1943, for $9,100.62?

A. Correct.

Q. That is an original record of Sears, Roebuck?

A. That's right.

Q. I will ask you whether or not the invoice of Bower-Giebel, under date of November 22, 1943, calling for 247 cases Pan O' Butter Chocolate Pecan Fudge, 18 pounds to the case, total amount paid on this invoice $2,445.30, and ask you [338] if that invoice was paid by that check? A. It was.

Q. I also call your attention to invoice dated——

The Court: Cannot that be covered by an omnibus question; if he would say that check is made up of invoices attached, and giving the numbers, it will save time?

Q. By Mr. Rolston: Mr. Saxe, the invoices

(Testimony of Ray Saxe.)
which are attached to this copy of voucher were all paid by this check, is that correct?

A. That is correct, sir.

Q. Mr. Saxe, did you have a phone conversation with Mr. Ashby on or about January 12th, where he told you to stop payment on this account?

A. To the best of my recollection I did, yes.

Q. Had he ever asked you to stop the account previously to that?

A. I don't recall that he did. I may have records to the contrary, however.

Mr. Rolston: That is all.

Cross Examination

By Mr. Wheeler:

Q. Mr. Saxe, showing you Exhibit No. 3, I will ask you if you recognize that exhibit?

A. Yes, sir, I do.

Q. What is that exhibit? [339]

Mr. Rolston: To which I object. The exhibit speaks for itself. It has already been identified.

Mr. Wheeler: Just so he can identify it.

A. It is an order to me by Mr. Ashby to withhold payment of this account.

Q. Did you receive it on the date that it bears?

A. That is hard for me to state. I assume that I did.

Q. With reference to check No. A 125670, which bears date January 13, 1944, was that check drawn and issued on January 13th?

(Testimony of Ray Saxe.)

Mr. Rolston: To which I am going to object. It speaks for itself.

The Court: No; there may be a variation in dates. Overruled.

A. No, the check was actually drawn to follow out regular routine, the day before.

Q. By Mr. Wheeler: So that it was drawn on the 12th? A. That's right.

Q. At the time that you received this stop order, did you make a search for that check?

A. I would say that I did not, not knowing there was one in process.

Q. Was the check in the possession of Sears, Roebuck and Company? [340]

A. On January 13th?

Q. On January 12th.

A. Yes, I believe it was.

Q. What was the procedure with reference to its mailing?

Mr. Rolston: To which I am going to object as entirely immaterial, your Honor. The check speaks for itself.

The Court: It has a bearing upon whether this order was received while the check was in process of being sent. You say you attach some significance to the fact that these payments were made. Overruled.

A. Will you restate the question?

The Court: Will you read the question?

(Question read by the reporter.)

A. The usual procedure is to write the check,

(Testimony of Ray Saxe.)

in this case, on the 12th; it would follow through the cashier's office, where the check is put through the protectograph, and signed and mailed on the 13th.

Mr. Wheeler: I have no further questions.

Redirect Examination

By Mr. Rolston:

Q. Mr. Saxe, do you have a copy of the unpaid invoices of Bower-Giebel Wholesale Company with you?

A. No, I don't. I believe they are here. I will take that back. I do have a copy of them. [341]

Q. Will you look through these copies that you have before you, and, excluding the top one, did any of those invoices cover any fudge, except for the top one?

A. I am not too familiar with candy. However, to the best of my knowledge I will answer your question.

Q. To save the necessity of that, let us introduce the whole thing, and we can examine it.

The Court: What is the materiality of putting it in?

Mr. Rolston: The reason I want him to look through it, your Honor, is only in regard to Exhibit 3. He says he did not hold up the orders, except the one order, and the other invoices were held up and unpaid. I want to bring that fact into the record.

(Testimony of Ray Saxe.)

The Court: He is examining them. He can tell.

A. It appears that, other than the top invoice, they don't cover fudge, to the best of my knowledge.

Q. By Mr. Rolston: Nevertheless, you did hold up the payment of those invoices, did you not?

A. That's right.

Mr. Rolston: That is all.

(Short recess.) [342]

JOSEPHINE McCANCE,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

The Clerk: State your name, please.

The Witness: Josephine McCance.

Direct Examination

By Mr. Rolston:

Q. Mrs. McCance, you are employed by Bower-Giebel Wholesale Company?

A. Yes, I am.

Q. You are Mr. Bower's secretary, are you not?

A. Yes, sir.

Q. I show you Plaintiff's Exhibit 8 in evidence, which is a copy of two letter dated November 29th, and December 3rd, both of which are addressed to the Bank of America, and have attached to them four checks. You typed those letters, did you not?

A. Yes, I did.

Q. Do you recall Mr. Ashby being present in the store on the occasions when you typed these letters?

(Testimony of Josephine McCance.)

A. I am positive of his being there on December 3rd, but I am not so sure of November 29th.

Q. Calling your attention to the letter of December 3rd, do you recall any conversation by Mr. Ashby and Mr. Bower that you overheard at that time? [343]

A. Yes, sir, Mr. Ashby came in in the morning, just before we opened, and we all went in together, and Mr. Ashby said that the fudge he had received was a little runny and moist, and the girls didn't like to handle it, but he thought if they would open the case and let it dry out, why, they could use it very easily.

Q. Was Mr. Ashby present when Mr. Bower told him to withdraw the stop-payment?

A. Yes, sir, he was.

Mr. Rolston: You may cross-examine.

Mr. Wheeler: I have no questions.

The Court: Call your next witness.

E. CARLTON BOWER,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

The Clerk: State your name.

The Witness: E. Carlton Bower.

Direct Examination

By Mr. Rolston:

Q. Mr. Bower, you are employed by Bower-Giebel Wholesale Company, is that right?

(Testimony of E. Carlton Bower.)

A. Yes, sir.

Q. Calling your attention to the month of December, [344] 1943, did the warehouse in which the business is operated have a quantity of fudge on hand? A. Yes, sir.

Q. Did you examine any of that fudge?

A. I did.

Q. Did you see any fudge that was moldy, or had signs of mold? A. No, sir.

Q. How many cases do you think you looked at yourself?

A. Oh, I suppose I have looked at 25, 50 or 100 cases, sir.

Q. Calling your attention to the fudge, on or about January 11, 1944, which was brought back to the warehouse from Sears, Roebuck and Company, 1928 pounds, did you examine that fudge, or any of it? A. I did.

Q. About how much of it did you examine?

A. Approximately eight or 10 cases.

Q. Were there any signs of mold in any of those cases? A. None that I examined, sir.

Q. Do you recall whether or not part of the fudge you had on hand the latter part of December, as well as the 1928 pounds returned from Sears, were sold in the ordinary course of business?

A. They were. [345]

Q. Did you receive any complaints of any nature from any purchaser? A. I did not.

Q. Mr. Bower, you were present at various conversations with Mr. Theaker with your father?

(Testimony of E. Carlton Bower.)

A. I was.

Q. You heard your father testify concerning those conversations? A. I did.

Q. Your father's testimony concerning those conversations was substantially correct, was it not?

A. Yes.

Mr. Rolston: If you want me to go into the conversations——

The Court: I don't know that there is any need for that. I don't know that the negotiations have anything except as containing possibly admissions. I think, if there was a settlement, it was between Ashby and the other man; between Bower and Ashby; not Theaker. I don't think you should take a lot of time going over matters of corroboration.

Mr. Rolston: I think they would have some bearing on Sears' attitude.

The Court: There is no question but what they continued to do business with them. I think that is [346] sufficient, so far as this witness is concerned. You may answer the last question. Did you hear it?

A. May I have the question?

The Court: Yes. Read it, Mr. Dewing.

(Question read by the reporter.)

The Court: Let me reframe that. Is your recollection of the testimony such that if you were to answer in detail the same questions, would you testify in substance in the same manner as your father?

A. Yes.

Q. About the conversations at which you were present? A. Yes.

(Testimony of E. Carlton Bower.)

Q. Can you add anything your father may have omitted from his narrative?

A. May I say this, your Honor: I don't recall whether Mr. Bower said he told Mr. Theaker, "We don't feel as though we had any further responsibility with the fudge, because of our action of November 29th and December 30th." And that anything he did would be as an assistance to Sears with their attempted settlement with the Karmelkorn Company.

The Court: Go ahead.

Mr. Rolston: That is all.

Mr. Wheeler: I have no further questions.

Mr. Rolston: We rest at this time.

The Court: Any rebuttal? [347]

Mr. Wheeler: Yes.

MORLEY L. THEAKER,

called as a witness on behalf of the defendant in rebuttal, being first duly sworn, testified as follows:

The Clerk: Please state your name.

The Witness: Morley L. Theaker.

Direct Examination

By Mr. Wheeler:

Q. Mr. Theaker, do you recall having conversations with Mr. Bower during the months of January and February, 1944, with reference to Pan O' Butter Fudge? A. Yes, sir, I do.

(Testimony of Morley L. Theaker.)

Q. Do you recall when the first conversation occurred?

A. It would have been during the month of January; the latter part of January.

Q. How did the conversation take place?

Mr. Rolston: Just a minute. Is this preliminary?

Mr. Wheeler: Yes.

A. Well, the conversation, the initial conversation was over the telephone.

Q. By Mr. Wheeler: Now, will you state the conversation that occurred between yourself and Mr. Bower?

A. Yes, sir. I called Mr. Bower, asking him to [348] either explain by telephone or come over and see me, so that we could try to eliminate a misunderstanding that had occurred, or seemingly occurred, up to this time regarding the defective fudge.

Q. Will you go on? Just state the conversation that occurred?

A. Well, Mr. Bower advised that the responsibility was with the factory, and not with him, and I, of course, told him that Sears, inasmuch as Sears had placed the order with Bower-Giebel that Sears would hold Bower-Giebel responsible for this defective merchandise.

The Court: Was that on the telephone?

A. Yes, sir, this was on the telephone.

The Court: Go ahead.

A. Further conversation produced from me an

(Testimony of Morley L. Theaker.)
invitation for Mr. Bower to come over and sit down in my office, and try and work this problem out, and specifically to see the merchandise up to this point. Mr. Bower told me that only two representatives, Mr. Erhart and, I have forgotten the other gentleman's name, had seen the merchandise, but he had not seen the merchandise, except a small sample Mr. Ashby had presented. So Mr. Bower agreed to come to my office the following morning.

Q. By Mr. Wheeler: Was there any reference in that conversation to a telephone conversation between Mr. Bower [349] and Mr. Squiers?

A. Mr. Bower specifically mentioned that Squiers or Pocius—I have forgotten which—had assured him an adjustment would be made to the Sears, Roebuck Company.

Q. Was there any reference to the time when the telephone conversation between Mr. Bower and Mr. Pocius and Mr. Squiers had occurred?

A. Yes, sir, it was later; but it was before Christmas.

Q. Was there any discussion at that time with reference to taking the matter up with the Karmelkorn people?

A. Yes, upon Mr. Bower's visit to my office——

Q. I mean in this telephone conversation.

A. Well, I can't recall verbatim. I would say that was possibly the second telephone conversation.

Q. Then you had two conversations?

A. That's right.

(Testimony of Morley L. Theaker.)

Q. When did the second conversation take place?

A. After I had wired Chicago in an effort to determine if they had made an adjustment to Mr. Bower regarding this defective fudge.

Q. Can you fix the date of your telephone conversation, that is, the second telephone conversation? A. I assume it was February 1st.

Q. With reference to that telephone conversation, what was said at that time? [350]

A. Chicago, or our representative in Chicago, upon contacting the Karmelkorn had been advised that a satisfactory adjustment had been made with Bower-Giebel, which applied to our defective fudge, and I, of course, gave Mr. Bower that information.

The Court: Start from there, and just follow it clearly.

A. O. K. Well, I gave that information to Mr. Bower, and he disputed it and requested that I contact, or he requested that I again contact our Chicago office, and submitted to me some additional information which would refute the statement made by the Karmelkorn representative, which I did, and I subsequently received a long detailed letter in which they again assured us that an adjustment had been made to Mr. Bower.

Q. By Mr. Wheeler: In this telephone conversation on February 1st was there any reference to the telephone conversation, or a telephone conversation, between Mr. Bower and Mr. Squiers or Mr. Pocius of Karmelkorn?

(Testimony of Morley L. Theaker.)

A. Prior to Christmas Mr. Bower, in requesting that I contact the Chicago office, had assured me that he had received a telephone from either Squiers or Pocius, I don't recall which, advising that they would make a satisfactory adjustment for the defective fudge.

Q. And he stated that that conversation had occurred [351] prior to Christmas?

Mr. Rolston: That has been asked and answered, your Honor.

The Court: Go ahead.

Q. By Mr. Wheeler: Did you have any further conversation with Mr. Bower during that time, I mean during the telephone conversation?

A. I don't recall any additional information.

Q. By the Court: Did he talk to you as a result of that, when he did arrive at your place after the second telephone conversation?

A. No, after the first telephone conversation.

Q. Between the first and second?

A. That's right.

Q. By Mr. Wheeler: What visit did he make?

A. He and his son came up to my office. We sat and discussed the case to some length, and then drove to our warehouse where we inspected this 9,000 pounds of defective candy.

Q. During this conversation in your office did you tell Mr. Bower that the first half of the candy was good; that we sold all of that; that the last lot was part good and part bad?

A. I told Mr. Bower that we had sold——

(Testimony of Morley L. Theaker.)

Q. Answer the question. [352]

A. Not specifically that, no, sir.

Q. What did you say?

A. I told Mr. Bower that we had sold 20,000 pounds out of the original 29,000 pounds purchased. In other words, we had sold the good candy, and we still retained 9,000 pounds of defective candy, for which we wanted an adjustment.

Q. Was there any discussion with reference to the service from Chicago being refrigerated, the trucking service?

A. No, sir, there was not. I don't know that there was such a service on candy.

Q. Did you say that the matter should be taken up with the factory for adjustment?

A. No, sir. Mr. Bower said that.

The Court: In other words, you took the view that you had dealt with Bower, and an adjustment should be made between him and the company?

A. Absolutely.

Mr. Rolston: May I interrupt to object to the court's question as calling for the conclusion of the witness?

The Court: We are reaching the end of the case, and I have had so many versions of this conversation. We are trying it without a jury, and we have got the power in the federal court, Mr. Rolston, I think at this stage, where we have probably the last witness, to cut corners. I don't [353] want to seem critical, but you are moving very slowly.

(Testimony of Morley L. Theaker.)

Q. By Mr. Wheeler: Did you have any further conversation with Mr. Bower?

A. Yes, after receiving the final letter from Chicago, in which they gave me a detailed account of their adjustment with Mr. Bower, and assured us any adjustment we might expect would have to come from Mr. Bower, I, in turn, called him and acquainted him with this information from Chicago, and asked him to discuss it with me. At that time he terminated the conversation abruptly by stating that he and I would be unable to adjust the matter.

Q. Did you have any conversation on or about February 11th with reference to Squiers of Karmelkorn or O'Brien of Karmelkorn?

A. I don't recall, Mr. Wheeler; it would have been contained in the letters which I received from our Chicago parent.

Mr. Wheeler: I have no further questions.

Cross Examination

By Mr. Rolston:

Q. Mr. Theaker, during one of these conversations Mr. Bower did go over a series of Karmelkorn invoices and checks which paid for them, did he not? A. Yes, he did.

Q. I show the witness Plaintiff's Exhibit 4, a series [354] from 4-A to 4-M.

The Court: Those are invoices between the Karmelkorn——

Mr. Rolston: Invoices between Karmelkorn and Bower-Giebel.

(Testimony of Morley L. Theaker.)

A. That's right. I have reviewed these.

Q. Mr. Bower pointed out to you at that time that the only adjustment he received from Karmelkorn was covering his own fudge, and did not involve Sears' fudge in any way, is that right?

A. That was his contention.

Q. As a matter of fact, you asked Mr. Bower to take it up with the factory and see if the factory would make an adjustment for his fudge?

A. Certainly, I asked him to make an adjustment, and if it required negotiations with the factory it was his responsibility.

Mr. Rolston: I ask that the last portion be stricken as not responsive.

The Court: I think I will strike the entire answer. Listen to the question carefully, and if you can answer it yes or no you may do so, and then if you want to explain it, you may. Read the question again, please.

(Question read by the reporter.)

A. Not specifically in those words, your Honor.

The Court: All right. [355]

Q. By Mr. Rolston: Mr. Theaker, I show you a copy of a letter addressed to you from Bower-Giebel, which is Plaintiff's Exhibit 10, and it has attached to it a copy of a telegram. Did you receive that letter? A. Yes, sir.

Q. You did receive this? A. Yes.

Q. You also received a copy of this letter of November 29th, did you not?

A. I would have to see it, of course.

(Testimony of Morley L. Theaker.)

Q. I will show it to you.

The Court: Mr. Theaker, you did not tell us what your position is; at least I did not hear you tell us. Everybody assumes that we know as much as they do about these personalities. So will you tell us the position you occupy, which brought you into this?

A. I am the district superintendent, with headquarters in our main office here in Los Angeles.

Q. It is a part of your job to end disputes?

A. Yes, operational problems.

Q. Operational problems between the management and outsiders come to you? A. Yes.

Q. By Mr. Rolston: I hand you a copy of the letter of November 29th. You received a copy of that, did you not? [356]

A. Yes, sir, I received a copy of this.

The Court: Refresh my recollection. Which letter are you talking about?

Mr. Rolston: That is the letter when Mr. Ashby complained.

The Court: November 29th.

Mr. Rolston: Yes. I show you at this time Plaintiff's Exhibit No. 11, a letter directed to you, under date of February 11, 1944, and it has attached to it certain listings of fudge, which is directed to Sears, Roebuck, and the manner in which Bower paid for it. Did you receive that letter and a copy of the statement?

A. Yes, sir, I did.

Q. In the previous telephone conversation, to-

(Testimony of Morley L. Theaker.)
gether with that letter, Mr. Bower repeatedly told you he had paid in full the purchase price of the fudge that Sears bought, is that right?

A. Yes, sir, he told me that.

Q. Do you recall either of the Mr. Bowers,—either of them pointing out to you at the warehouse that the fudge had not been pro-rated properly; that still part of the first shipments were on hand?

A. Yes, sir, I remember, I don't recall specifically mentioning of rotation, but they did call my attention to part of the first shipment being included in the defective lot. [357]

Q. When you are referring to the defective lot, you are referring to all the fudge you had on hand?

A. I am referring to the defective 9,000 pounds.

Q. By the Court: That was returned to the stock pool? A. Yes.

Q. That is what you were talking about? You were calling it defective. You had not examined it yourself; it had been placed there from various sources? A. Yes.

Q. You were talking about that? A. Yes.

Q. But you had not individually examined the 9,000 pounds to see its condition?

A. I examined perhaps 25 or 30 cases of it.

Q. In the presence of Mr. Bower?

A. I examined possibly 15 cases in the presence of Mr. Bower.

Q. By Mr. Rolston: That was in February?

A. Yes, sir.

Mr. Rolston: That is all.

Mr. Wheeler: I have no further questions. Mr. Ashby.

The Court: Let us limit Mr. Ashby. Mr. Ashby has been back and forth with this story, and I want to limit the picture to new matters. [358]

Mr. Wheeler: Yes.

RALPH PARKER ASHBY,

recalled as a witness on behalf of the defendant, in rebuttal, having been previously duly sworn, testified as follows:

Direct Examination

By Mr. Wheeler:

Q. Mr. Ashby, did you have any conversation with Mr. Mitchell on the occasion of the visit of Mr. Mitchell on January 12th to your office, or at any other time, in which you stated that Sears, Roebuck and Company had already taken a 20c mark-down on the fudge, and that it was not Sears' policy to sell merchandise at a loss?

A. I did the first statement, that is, to the effect that Sears had already taken a 20c plus mark-down, but I did not make the latter part of the statement.

Q. Did you have any conversation with Mr. Clark after December 24th, or at any other time, in which you stated that you had over-bought on this Pan O' Butter Fudge?

(Testimony of Ralph Parker Ashby.)

A. I absolutely did not have that conversation at that time.

Q. Or at any other time did you have such conversation?

A. Nor at any other time did I make that statement.

Q. Did you have any conversation with Mr. Bower, either [359] before Christmas or after Christmas, in which you stated to him that you had over-bought?

A. I absolutely did not make that statement.

Q. With reference to this question of over-buying, do you have figures as to candy sales, or sales of the candy departments of the stores, during that period of time? A. I do.

Mr. Rolston: To which we object. I don't think it is material at all.

The Court: I don't think it is material. The question is as to the particular item in this complaint; that is what we are interested in.

Mr. Wheeler: If your Honor please, it is just to show the volume of sales.

The Court: I don't think that would bear upon the question.

Q. By Mr. Wheeler: With reference, Mr. Ashby, to your conversation on October 20, 1943, in Mr. Bower's office, was there any discussion in your presence with reference to the method of shipment?

A. There was no discussion in my presence as to the method of shipping other than the statement as to carload quantity.

(Testimony of Ralph Parker Ashby.)

Q. Now, Mr. Ashby, based upon the testimony as to the manner in which this candy was packed, and the type of fudge [360] that it was, and the method of storing the fudge, what is your opinion as to the time which this fudge should last?

Mr. Rolston: To which we object, your Honor, upon the ground that it is not proper rebuttal, asking for a conclusion of the witness.

The Court: Objection overruled.

A. In my opinion, fudge of this type should keep as a minimum, four months, and I have known specific instances where it has kept a year.

Q. By Mr. Wheeler: That is, under conditions similar to those under which this fudge was kept, according to the testimony?

A. What I would call a normal handling.

The Court: We already know this fudge was kept ordinarily in your storeroom.

A. That's right.

Q. Where the temperature was rather cool, and only from day to day various amounts were brought down to the store which, of course, was heated to a higher temperature. A. That's right.

Q. By Mr. Wheeler: Mr. Ashby, referring to your telephone conversation with Mr. Bower on December 2, 1943, did you state, "Don't worry; I can use the fudge"?

A. I did not make that statement.

Q. Did you have any conversation with Mr. Bower prior [361] to Christmas with reference to losing your job? A. I did.

(Testimony of Ralph Parker Ashby.)

Q. When was that conversation?

A. The exact date I do not recall. As I pointed out before, there were many times I was talking with Mr. Bower, as much as two or three times a week. I don't recall when that particular statement was made.

Q. What was the conversation that you had?

A. I don't recall the exact words of the conversation, but I can recall making that statement. I used it as a pressure, to try and get some adjustment from Mr. Bower.

Q. By the Court: Did you tell him in that conversation—I think it was already asked and denied —did you tell him in that conversation that the big shots called you on the carpet, and you overbought this item and came near losing your job, but things were all right?

A. I testify to making the statement that I came near losing my job, but I don't testify to the statement that the big shots were all excited, because they weren't.

Q. Did you in any of this conversation intimate you over-bought this particular item; that you were being held responsible for it, and you were attempting to get your money out of it?

A. It was my job to be held responsible for it, but I did not make the statement that I had overbought the item. [362]

Q. By Mr. Wheeler: In your conversation at the time that you took the slab of fudge that was

(Testimony of Ralph Parker Ashby.)

hard to Mr. Bower's office, did he at that time say to you, "There's nothing that I can do to the fudge"?

A. He did not.

Q. Did he at any time, prior to January 12th, disclaim responsibility for the fudge?

A. No, he did not.

Q. Did you at any time have a conversation with Mr. Bower in which you stated that the fudge was kept in rooms in which the temperature was maintained at 72 degrees?

A. May I explain that we had that conversation, but there was no specific mentioning of the degree of temperature.

Q. What was the conversation?

A. The conversation was just along the line of what the temperature was. I explained that it was cool, but the degree was not mentioned.

The Court: Did he ever intimate to you he thought you kept it too hot, and no wonder it was running because you kept it in a hot room?

A. That is correct. He brought that up from time to time.

Q. But you did not at any time agree that was the case, and that would cause the trouble, did you?

A. No, sir. [363]

Mr. Wheeler: I have no further questions.

Cross Examination

By Mr. Rolston:

Q. That conversation regarding Mr. Bower

(Testimony of Ralph Parker Ashby.)
bringing in the heat situation only came up after you showed him this piece of fudge?

A. That's right.

Q. There was no mention of any hot temperature prior to January 4, 1944?

A. Not that I recall.

Q. As a matter of fact you did not ask Mr. Bower to do anything about the fudge between November 25th and January 4, 1944, isn't that true?

A. I certainly did.

Q. When?

A. On each of the various trips that I made down to Mr. Bower's office, there was always some grumbling about the fudge.

Q. You say "grumbling"?

A. Yes, about having a lot of trouble with this.

Q. Having trouble with the girls?

A. As I explained before, that statement about trouble with the girls was only extracted from the body of my statement.

Q. That was part of your statement, though?

A. Yes, sir, that part was.

Q. As a matter of fact, though, you at no time told him that something was going to have to be done about this, between November 25th and January 4th, is that true?

A. I don't recall making that specific remark.

Q. You never asked him for an adjustment between those dates, did you?

A. I would like to qualify my answer.

Q. First answer yes or no.

(Testimony of Ralph Parker Ashby.)

A. I did not ask for a specific adjustment, because from our previous conversation we were merely settling down to the particular part of the fudge that was salable. There was no question of adjustment, because at that time I did not know how much the salable fudge amounted to.

Mr. Rolston: I move to strike out the last part of the witness' answer as a conclusion, and not an explanation.

The Court: You asked a general question, and he gave you a direct answer, and then explained it. You have given us your version of what took place when you told him about having stopped payment on his invoices, and then about dictating a letter in your presence. I don't remember whether you were asked this specific question on cross examination—whether you did not say to him, "I'll keep the fudge"; did you say that?

A. I don't remember that statement, no, sir.

Q. Relate the statement you made at the time. I am talking about the second conversation when he called in the young lady and told her to write to the bank and withdraw the stop-payment.

A. Well, sir, I can't recall the exact conversation at that time because, as I stated before, I was not too concerned about Mr. Bower individually. My recollection of the thing is that he probably called the girl over.

Q. But you told us already that you told him at that time that you would not stop his invoices?

A. Yes, that I would stop——

(Testimony of Ralph Parker Ashby.)

Q. That you would not stop them. You said you told him you had stopped them, but in fact you had not? A. I had not actually done it.

Q. You merely told him in this conversation that you had not stopped them?

A. That's right. I had not actually at any time stopped them.

Q. You did not actually stop them until you sent the note of the 12th of January to Mr. Saxe?

A. That is correct.

Q. I thought perhaps that would refresh your your recollection as to what you did say when you told him you had decided for the present, at least, not to stop his invoices, but let them go through? [366]

A. I can't recall, because, as I said, we were back and forth together continually. I know I told him that I was going along with the fudge, the salable part.

Q. You did not use the words "I'll keep the fudge"? A. No.

Q. And that you were going to do it because Erhart had shown you how it could be done, and that the suggestion was working out?

A. No, sir.

The Court: That may be repetitious, but it was not clear in my mind. It may be clear to you gentlemen. You are free to examine the witness further on the subject.

Mr. Rolston: No, your Honor, I think this wit-

(Testimony of Ralph Parker Ashby.)

ness has covered that particular thing several times.

The Court: All right.

Q. By Mr. Rolston: Did you tell Mr. Bower at any time, on either December 2nd or 3rd, that you could use the fudge all right?

A. I did not get the last part of the statement.

Q. Did you tell Mr. Bower at any time, on December 2nd or 3rd, words to this effect: "I can use the fudge"? A. I did not.

Q. You never used such words at all?

A. No.

Q. Your answer to that is no? [367]

A. I said, "I can use the fudge that is salable."

Q. You added those words?

A. Definitely. That was the whole purport of the conversation.

Q. You added those words each time you made a remark regarding the use of the fudge?

A. If I made the remark I only made it once, and those words were on the end of it.

Q. You knew that this fudge had butter in it, did you not?

A. I don't know that it had butter in it. It said that on the label.

Q. That it had cream in it?

A. It said that on the label.

Q. You knew those items of fudge are highly perishable? A. Are they?

Q. Do you know that?

A. Those two items are highly perishable under a certain set of circumstances.

(Testimony of Ralph Parker Ashby.)

Q. You knew that fact, did you not?

A. Yes, I knew that fact.

Q. If the butter was in large proportion as well as the cream in large proportion, that would increase its perishability, would it not?

A. Under a certain set of circumstances only.

Q. You know, as a matter of fact, that butter and cream have to be kept under refrigerated conditions to be preserved any substantial length of time?

A. I think that is general knowledge, yes.

Mr. Rolston: That is all.

Redirect Examination

By Mr. Wheeler:

Q. Mr. Ashby, if butter and cream are in fudge that is properly cooked, what is the situation with reference to the keeping qualities of the fudge?

A. That fudge should keep—and I speak as an expert; I have been in many factories where fudge has been made—that fudge should keep a minimum of from four months to a year, and if the Judge will give me one moment I can point out very definite facts about fudge. May I?

Mr. Rolston: I object to any voluntary statement of the witness.

The Witness: All right. You asked for it.

Mr. Rolston: I did not ask for it.

The Court: I think that is sufficient. I don't want to open up a new field.

Mr. Wheeler: I have no further questions. [369]

IDA FRIEDLAND,

called as a witness on behalf of the defendant, in rebuttal, being first duly sworn, testified as follows:

The Clerk: State your name.

The Witness: Ida Friedland.

Direct Examination

By Mr. Wheeler:

Q. Miss Friedland, you are employed by Sears, Roebuck and Company? A. I am.

Q. You are secretary to Mr. Theaker?

A. Yes, sir.

Q. Calling your attention to a telephone conversation between Mr. Bower and Mr. Theaker on or about February 1st, 1944, I will ask you if you made stenographic notes of that telephone conversation? A. I did.

Q. Do you have your notes with you?

A. Yes, I do.

Q. Will you read from your notes the portion of the conversation commencing as follows: "That man in Chicago"——?

A. "That man in Chicago assured me that he would make your fudge good. Squiers, he's the sales manager for salad dressing, and Victor of Karmelkorn, they are in together on this fudge. If you have a way of communicating with your [370] boys in Chicago, remind them that he positively assured me, with a long distance telephone call, they would make any fudge good that Sears had. He called just before Christmas."

(Testimony of Ida Friedland.)

Q. Does that telephone conversation begin "Mr. Bower: They should"——

A. No; that's another conversation.

Q. Will you read that portion of your notes which indicates that Mr. Bower is again talking, and they should make that direct with him?

A. Yes. Mr. Bower speaking: "They should make that direct with you. They can use the sugar content out of it. Maybe Sears, Roebuck can handle it in Chicago and save the transportation. But if we will get the 9,000 pounds of good fudge we will accomplish something. They are not out anything but their labor. Mr. Squiers assured me they would make good any defective fudge that Sears had. He is a manager of Durkee mayonnaise. Victor Pocius flew here. He has the concession in your seven or eight stores. He sold that fudge in your store a good many years. He appeared to be a very fine man. I thought everything was O. K. We reached an agreement. Ashby said he could use it or I would have been glad to come over and see him."

Q. Will you also read the next conversation with Mr. Bower? [371]

A. (Reading): "I believe they will be glad to make the fudge all good. They will work it all over. The material is still there and they can work it all over. In your night letter be sure and remind them to check and see if he has the concessions in your stores. Squiers seems to have the

(Testimony of Ida Friedland.)

authority. He is the man who positively assured me that he would make any fudge good to you."

Mr. Wheeler: I have no further questions. You may cross-examine.

Mr. Rolston: No questions. It is exactly the same.

ELLEN HIBBS,

called as a witness on behalf of the defendant, in rebuttal, being first duly sworn, testified as follows:

The Clerk: State your name.

The Witness: Ellen Hibbs.

Direct Examination

By Mr. Wheeler:

Q. Miss Hibbs, you are employed by Sears, Roebuck and Company? A. That's right.

Q. You are Mr. McCaffrey's secretary, are you?

A. Yes, sir. [372]

Q. He is the district manager?

A. Yes, sir.

Q. Calling your attention to a telephone conversation between Mr. Bower and Mr. Theaker, did you make a transcription in shorthand of that telephone conversation? A. Yes.

Q. Can you find your notes, the part which is indicated as a conversation by Mr. Bower, and beginning: "He knows different"?

A. (Reading): "He knows different. They

(Testimony of Ellen Hibbs.)
called me on long distance telephone between Christmas and New Year's. I have a record of the man's name; he is connected with Karmelkorn. We raised the dickens that they shipped more fudge after we cancelled the shipment and they continued to ship it. I told them we couldn't sell one dollar a pound fudge after Christmas. We've been selling fudge at 89c but it wasn't moving fast enough for the quantities we got. You haven't anything to worry about. Sears have been complaining and he says he will make Sears' fudge good, too. I'll get the man's name. I believe between us we can get that outfit to make it good."

Mr. Wheeler: I think that is all.

Q. By Mr. Rolston: When was that conversation?

A. February 1st.

Mr. Wheeler: I have no further questions. I have no [373] further witnesses.

The Court: Anything else?

Mr. Rolston: No, your Honor.

[Endorsed]: Filed Jan. 14, 1946. [374]

[Endorsed]: No. 11236. United States Circuit Court of Appeals for the Ninth Circuit. Bower-Giebel Wholesale Co., a co-partnership composed of Earl E. Bower and Walter Hamilton Bower, Appellant, vs. Sears-Roebuck & Co., a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed January 19, 1946.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the Circuit Court of Appeals of the United States for the Ninth Circuit

No. 11236

BOWER-GIEBEL WHOLESALE COMPANY, etc.,

Plaintiff and Appellant

vs.

SEARS, ROEBUCK AND CO.,

Defendant and Appellee

STATEMENT OF POINTS ON APPEAL AND DESIGNATION OF RECORD

Comes now the appellant, Bower-Giebel Wholesale Company, a co-partnership and makes this

statement of points on appeal and designation of the record required to be printed as follows:

STATEMENT OF POINTS ON APPEAL

I.

The evidence is insufficient to justify the decision and judgment in the following specifications, among others:

(1) The judgment should be for the plaintiff in the sum of $7,738.99, together with interest at the rate of 7% per annum from January 14, 1944, against which the Court apparently has allowed a set-off in the sum of $6,637.80;

(2) The evidence is insufficient to support the finding and conclusion that notice of any alleged defect was given to the plaintiff with sufficient timeliness and clarity as required by the laws of the State of California and of the United States Courts;

(3) That the evidence is insufficient in failing to disclose any cause for the alleged defectiveness of the merchandise involved;

(4) That the evidence is insufficient to support the damages allowed on the counterclaim in that the defendant failed to set forth all of the elements of said alleged damage.

II.

Errors in law occurring in and during the trial, including, but not limited to the following:

(1) All evidence of other adjustments of candy

other than that delivered to the defendant and appellee was not properly admitted as in being proof of whether or not candy delivered to the defendant and appellee was defective or to prove any other issue before the Court;

(2) The evidence clearly shows that the defendant and appellee, by their conduct, statements, and actions, were estopped from claiming any breach of warranty.

(3) That the Court did not properly apply the measure of damages and loss of profits;

(4) That the Court erred in finding that there was any express warranty;

(5) That the Court erred in finding that there was any express request by plaintiff for defendant to continue to receive further shipments;

(6) That the Court erred in finding that plaintiff would be required to pay defendants' losses for the unmerchantable portion of the product delivered;

(7) That the Court erred in making any finding whatsoever with regard to any adjustments made between plaintiff and the manufacturer involving candy other than that delivered to the defendant.

DESIGNATION OF RECORD

The appellant requests and designates that the entire transcript be printed, as well as all of the exhibits in that all of said record and exhibits are

necessary for a proper and full consideration of all of the points raised by the appellant.

Respectfully submitted:

(Signed) JEROME D. ROLSTON

Attorney for Plaintiff and Appellant

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed January 31, 1946. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

ORDER ELIMINATING EXHIBITS FROM PRINTED TRANSCRIPT

Good cause therefor appearing, It Is Ordered that the original exhibits in above cause need not be printed in the printed transcript of record, but will be considered by the Court in their original form.

(Signed) FRANCIS A. GARRECHT

Senior United States Circuit Judge.

Dated: San Francisco, Calif., February 12, 1946.

[Endorsed]: Filed February 13, 1946. Paul P. O'Brien, Clerk.

No. 11236

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

Bower-[illegible] Wholesale Co., a copartnership composed of Earl E. Bower and Walter Hamilton Bower,

Appellant,

vs.

Sears-Roebuck & Co., a corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

Jerome D. Ralston,
6253 Hollywood Boulevard, Los Angeles 28,
Attorney for Appellant.

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No. 11236

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

Bower-Giebel Wholesale Co., a copartnership composed of Earl E. Bower and Walter Hamilton Bower,

Appellant,

vs.

Sears-Roebuck & Co., a corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

Statement of Jurisdiction.

The Appellant filed suit in the Superior Court of the State of California in and for the County of Los Angeles, on a common count for the value of goods, wares and merchandise delivered to Appellee, and on the second count on the open-book account, and on the third count for accounts stated all in the sum of $7,738.99, together with interest thereon from January 14, 1944 [Tr. 2, 3, 4] and thereafter the Defendant and Appellee was served with copy of Summons and Complaint in said action. Defendant and Appellee thereupon made a motion to remove said cause to the United States District Court for the Southern District of California, Central Division, said Petition for Removal being made upon the grounds that there is diversity of citizenship between

the parties in that the Plaintiff and Appellant is a copartnership and the principals thereof are citizens of the State of California, while the Defendant and Appellee is a corporation created and existing under the laws of the State of New York, and at the time of the petition, was still a resident and citizen of the State of New York, and was a non-resident of the State of California, and further that the amount in controversy involved exceeded $3,000.000. [Tr. 5, 6, 7.] The Superior Court thereupon granted said petition and the matter was removed to the said District Court. [Tr. 12, 13.]

On June 9, 1944, Defendant and Appellee filed its Answer and Counter-Claim, said Counter-Claim having several causes of Counter-Claim based upon breaches of different warranties, and claiming $10,358.02 to be due Defendant and Appellee. [Tr. 15-23.] That thereafter Plaintiff and Appellant filed its reply to said Counter-Claim, setting forth denials as well as the affirmative defenses of negligent handling by Defendant and Appellee, laches on the part of Defendant and Appellee, and waiver and estoppel. [Tr. 24-29.]

The matter was thereafter tried before the Honorable Leon R. Yankwich, Judge of said District Court, and on April 2, 1945, judgment was thereupon rendered in said Court. [Tr. 44, 45.] Within the time prescribed by law, Plaintiff and Appellant filed its Motion for New Trial [Tr. 45, 46, 47], and on September 10, 1945, said Motion for New Trial was denied, [Tr. 48], and thereafter, within the time prescribed, the

Plaintiff and Appellant served and filed its Notice of Appeal [Tr. 48, 49], and on January 12, 1946, the parties, through their attorneys, entered into a Stipulation concerning the record on appeal and the case was thereupon certified to the Circuit Court of Appeals. [Tr. 50, 51.]

U. S. Circuit Court of Appeals for the Ninth Circuit has jurisdiction of this appeal by virtue of Section 128-A of the Judicial Code as amended February 13, 1925. (28 U. S. C. A. Sec. 225.)

Statement of the Case.

The within proceeding was instituted by the Appellant to recover monies past due for goods, wares and merchandise sold and delivered at the Defendant's special instance and request and upon an open-book account, the third count, to-wit, on the account stated having been abandoned by Stipulation in open court. [Tr. 52.] The ledger sheets and invoices which were introduced as Plaintiff's Exhibits 1 and 2 [Tr. 53] show that the goods, wares and merchandise were of a general character handled by Appellant and Appellee in their normal course of business and at the time of trial the Defendant and Appellee stipulated in open court that said amounts were properly due and that no evidence would be necessary to support said claims and that the sum of $7,738.99, together with interest at the rate of 7% per annum from January 14, 1944, was due, owing and unpaid to the Appellant. [Tr. 52, 53.]

The Appellee then proceeded on its Counter-Claim and the facts involved in said Counter-Claim are hereinafter set forth:

In October of 1943, the parties had a conference concerning the sale of fudge by Appellant to Appellee, at which time a sample was shown to the buyer of Appellee. After considerable conversation, Appellee placed an order for 28,000 pounds of said fudge at 55¢ per pound, [Tr. 56, 57], and during the conversation Appellant advised Appellee that the Appellant had no knowledge of that type of fudge and that the Appellee in turn had "lots of experience" [Tr. 110] and the Appellee thereupon also testified that it did not rely on any custom or usage in the business. [Tr. 111.]

The Appellee also desired a change from the sample, requesting that the fudge, when shipped, contain more nuts and also be a lighter color. [Tr. 109, 110; 61.] In that conversation the Appellant had very little to say in that most of the conversation was carried on between the Appellee's representative, Mr. Ashby, and the factory representatives, Mr. Erhardt and Mr. Mitchell. [Tr. 55, 56.] In the presence of the said Mr. Ashby, the Appellant thereupon gave the factory representatives his check in the sum of $7,000.00 in partial payment of the order placed by Mr. Bower of Appellant to the manufacturer. [Tr. 298.] Thereafter and after the formula had been changed to include the additional nuts and change of color, a further sample was air-mailed from the factory and shown to Mr. Ashby, which oc-

curred on November 1, 1943. [Tr. 295, 296.] Shipments were then made and various quantities were received by Appellee, beginning November 15, 1943 and when they had received the total amount of their purchase order on or about December 4, 1943 [Tr. 253, 254], Appellee diverted the shipments to their various stores and said fudge was thereafter offered and sold to the public. [Tr. 255.]

On November 29, 1943, Mr. Ashby, the representative of Appellee, visited the Appellant and complained of the manner in which the fudge was coming in and specifically complained that the fudge was too moist and soft to be salable and usable and at that time the said Mr. Ashby advised the Appellant that he was stopping payment on Appellant's account and that the fudge would not be paid for, and in the presence of Mr. Ashby, Mr. Bower, partner of the Appellant, dictated a stop-payment order to their bank, stopping the payment of checks which he had theretofore forwarded to the manufacturer. [Tr. 297, 298.] The factory representatives then called upon Mr. Ashby and showed Mr. Ashby how to handle the fudge and thereby dispose of same. [Tr. 300; 169.] Thereafter, and on December 2, 1944, Mr. Ashby phoned Mr. Bower and advised him that he could use the fudge and that Appellant would receive a check within a few days and that the Appellant should release the stop-payments that he had theretofore placed against the checks which he had forwarded to the manufacturer, [Tr. 300], and in reliance upon Mr. Ashby's statements, the Appellant paid for the fudge.

That from December 2, 1943, to January 12, 1944, the Appellant received no notice that the fudge was not saleable but did receive various and sundry complaints that the extra Christmas girls did not like to handle the fudge and that it was not selling too well, and that Mr. Ashby had over-bought. [Tr. 303; 288.] These facts are admitted by Mr. Ashby. [Tr. 133, 134.] There were several conversations after January between the parties and finally on January 12, 1944, the Appellee stopped payment on Appellant's account [Tr. 367] which then showed a balance due in the amount prayed for in the Complaint and which was stipulated by the parties as having been due on that date, to-wit, $7,738.99.

Appellee claims that some of the fudge was not saleable, to-wit, 9,620 pounds [Tr. 42], and Appellee's Counter-Claim was found to have due for said breach of warranty $6,637.80. [Tr. 42.]

Specifications of Error.

The Court erred in the following particulars:

(1) That upon the Stipulation of the parties and upon the findings, the judgment for the Plaintiff should have carried interest on the full amount, to-wit, $7,738.99, at the rate of 7% per annum, from January 14, 1944, and that the amount awarded the Appellee on the Counter-Claim, to-wit, $6,637.80, should bear interest only from the date of Judgment, to-wit, April 2, 1945.

(2) That the evidence is insufficient to support the findings in conclusion that notice of any alleged defect

was given to the Appellant with sufficient timeliness and clarity.

(3) That the evidence is insufficient in failing to disclose any cause for the alleged defectiveness and unsalability of the fudge, which burden is upon the Appellee claiming defectiveness and unsalability.

(4) That the evidence is insufficient to support the damages allowed in the Counter-Claim in that the Appellee failed to allege and prove all of the elements of said alleged damage, to-wit, the elements of profit.

(5) That the evidence of adjustments of fudge other than that delivered to the Appellee was improperly admitted.

(6) That the District Court should have found that the Appellee was estopped by his actions and conduct from claiming any breach or damage therefrom.

(7) That there is insufficient evidence to show any express warranty.

(8) That there is insufficient evidence to support the findings that the Plaintiff and Appellant made any express requests to Defendant and Appellee for the Appellee to receive further shipments after the discovery of the alleged defectiveness.

(9) That the Court erred in making immaterial and irrelevant findings with regard to any adjustments made between the Appellant and the manufacturer, involving fudge other than that fudge delivered to the Appellee.

ARGUMENT.

I.

Interest on a Claim for Damage in an Unliquidated Amount Cannot Accrue Until After the Amount Is Ascertained by Judgment.

Under the Stipulation and evidence introduced by the Plaintiff and Appellant at the beginning of the trial [Tr. 52, 53] Plaintiff is clearly entitled to interest as prayed for in the Complaint, to-wit, 7% on $7,738.99, from January 14, 1944, and if the balance of the judgment is affirmed on appeal, Defendant is only entitled to interest from the date of judgment which is the first ascertainment of the amount of damages to which Defendant and Appellee would be entitled to under its Counter-Claim.

The law is clear that where the action is to recover unliquidated damages, no interest can be allowed until the amount is determined. This was the holding in the case of *Krasilnikoff v. Dundon,* 8 Cal. App. 406, 97 Pac. 172 at 174, in which case the action was one for damages resulting from a breach of warranty of quality, and the lower Court awarded interest from the date of sale. The District Court of Appeal reversed this ruling and a rehearing by the Supreme Court was denied, the Appellate Court holding that in such a case, interest runs only from the date of entry of the judgment.

For a similar holding, see *Armstrong v. Lassen Lumber and Box Company,* 260 Pac. 810 at 813. (Note: The District Court in the last above cited case modified

the judgment by striking interest which was awarded in the lower Court. A hearing was granted in the Supreme Court in the same case at which time the Supreme Court reversed the entire case and did not pass upon the propriety of the interest allowance or disaffirmance. See 269 Pac. 453.)

II.

Buyer Failed to Give Notice of Alleged Breach of Warranty Within a Reasonable Time.

In order to determine the above statement, it is necessary to first ascertain when the buyer did give notice. However, even this question is dependent upon a determination of what constitutes legal notice.

The general rule is found in many authorities and is as follows:

> "It must be such as fairly to apprise that the Buyer intends to look to him for damages for the breach."
>
> 55 *Corp. Jur.* 807, 808, par. 788;
>
> *Truslow & Fulle v. Diamond Bottling Co.,* 112 Conn. 181, 151 Atl. 492;
>
> *Bell v. Maine,* 49 Fed. Sup. 689

See also other definitions of what the notice must be in the following quotations and cases cited therefor:

> "The notice must be such as to repeal an inference of waiver and to be reasonably inferable therefrom that the Buyer is asserting a violation of his rights."
>
> *Nashua River v. Lindsay,* 242 Mass. 206, 136 N. E. 358.

"It is the obvious purpose of the statute that to fix liability on the Seller, the Buyer must give timely information of the Buyer's *intention to seek from the seller damages for the breach of warranty.*" (Italics ours.)

Silvera v. Broadway Department Store, 35 Fed. Sup. 625 at 626.

"The notice of the breach required is not of the facts . . .but of Buyer's claim that they constitute a breach. The purpose of the notice is to advise the Seller that he meet a claim for damages, as to which, rightly or wrongly, the law requires that he shall have early warning."

American Mfg. Co. v. U. S. Shipbuilding Board, 7 F. (2d) 565.

"It has been held that a mere complaint is not sufficient; the notice must advise the Seller that the Buyer is looking to him for damages."

Wildman Mfg. Co. v. Davenport Hosiery Mills, 147 Tenn. 561, 249 S. W. 984;

1 *U. L. A.* (Sales) 292.

The annotator for the Uniform Sales Act, in discussing the *Truslow & Fulle v. Diamond Bottling Co., supra,* interpreted the case as follows:

"The fact that the purchaser constantly complains to the Seller that the purchased product is defective and causes him to suffer great losses in his business is insufficient to constitute notice where the Buyer continues to accept the product for more than a year after the development of the trouble and relies upon the Seller's assurance of improvement of design and adjustment of losses."

Truslow & Fulle v. Diamond Bottling Co., supra, further goes on to cite that the purpose of the requirement of notice is to give the seller an opportunity of governing himself accordingly by taking such steps as may be necessary to protect himself.

In *Bell v. Maine, supra,* the Court placed upon the buyer the duty of exercising due diligence in inspecting the goods and advising the seller of the defects. The Court further conditioned the buyer's right of rejection upon a prompt and unequivocable complaint, further stating "mere complaint as to quality, while exercising dominion over the goods, does not constitute rejections."

To the same effect see *Cosmo Dress v. Perlstein,* 4 Atl. (2d) (Pa.) 596, where the Court held that the buyer's right to reject must be made promptly and unequivocably.

In applying the law applicable in the case before us, it is unequivocable that the first complaint, to-wit, that of Ashby's conversation on or about November 29, 1943, [Tr. 297-298] was withdrawn on or before December 3, 1944, [Tr. 300] and that the first notice, which complies with the requirements of the above cases, was that of Ashby's letter of January 20, 1944. [Tr. 100, Ex. H.] This is fully two (2) months after Ashby knew, or should have known, of the alleged defects. The evidence clearly indicates that Appellant did not consider the mere complaints a notice. The evidence of Bower's knowledge was merely that the buyer was having sales difficulties and that it was not wholly pleased with its purchase. The payment of the invoices by the buyer [Tr. 340, 341] negatives any prior complaint as constituting notice. None of the testimony introduced by the buyer could be called unequivocable so as to put the seller on

notice that a claim for damages was to be placed against him for the alleged defects.

From the above, it must be concluded from all the evidence that Bower never received notice sufficient to comply with the requirements of the statutes and cases prior to January 20, 1944.

We must now determine whether or not a notice given at that late date is given within "a reasonable time after buyer knows or ought to know, of such breach."

To resolve this question, we must look to and take in consideration the type of the commodity which was the subject matter of the sale and keep this fact in mind at all times. The evidence clearly indicates that candy is very perishable and particularly fudge. [Tr. 274, 275.] The perishability of fudge, as disclosed by the evidence, increases with the quantity of butter and cream used to make such fudge. [Tr. 275, 368, 369.] The Court can take judicial notice of the fact that butter and cream will spoil rapidly if kept at room temperatures, and also to preserve said product, it is necessary to keep them under refrigerated conditions. The witness, Mr. Mitchell, also testified that in his opinion as an expert, a 67° temperature was not sufficiently cool for the purpose of preserving this type of fudge. [Tr. 272.] The only refrigeration involved in the handling of the fudge was the fact that it was shipped in refrigerated cars from Chicago to the buyer's warehouse. In the instant case it is clear that the buyer waited until the perishable commodity had perished prior to giving any notice.

At this time, I also want to call the Court's attention to what other Courts have held to be a reasonable time for the giving of notice.

With respect to a sale involving shoes, it has been held that a delay from August 9th to September 17th, to-wit, thirty-eight (38) days, before giving notice of rejection, was an unreasonable delay as a matter of law.

Silberman v. Engel, 211 N. Y. S. 584.

Two (2) months was held to be unreasonable with regard to dress goods.

Elk Textile Co. v. Cohn, 75 Pa. Sup. Ct. 478.

In *Kaufmann v. Levy,* 169 N. Y. S. 454, a delay of 23 days was held to be unreasonable.

In *Bomze v. Schwartz Textile,* 100 Pa. Sup. Ct. 588, notice given 26 days after buyer should have known the breach with regard to cloth purchased was held to be an unreasonable delay.

See also *Foel Packing Co. v. Harris* (1937), 193 Atl. (Pa.) 152, where a delay from early June to August 24th was held to be unreasonable and this case went on to set forth that the buyer's exercise of ownership by selling the merchandise prevents his claim for breach of warranty even though the buyer, while using the product, complained as to the quality.

In considering the cases hereinabove set forth, the time limit exercised by the buyer in the instant case clearly was unreasonable in that those cases did not involve perishable commodities. Surely the time must be shortened where we have an item such as fudge, which the testimony clearly indicates is extremely perishable. In view of the above holdings, it is respectfully submitted that the notice given by the buyer in the instant case was not timely for the preservation of his claim for damages.

III.

It Is Incumbent Upon the Buyer (Appellee) Who Asserts a Breach of Warranty, to Prove the Cause Thereof and That the Cause Proved Results From the Seller's or Manufacturer's Actions.

The above rule of law has been set forth on several occasions in California. The leading case on the subject is that of *Consolidated Pipe Co. v. Gunn,* 140 Cal. App. 412, 35 P. (2d) 350 at 352. In the said case, the buyer failed to prove any defect in the merchandise sold, but he did prove that under normal working conditions and under normal use, the product of the seller did not perform the task which it normally would perform. The District Court of Appeal, in affirming the trial court's denial of relief to the buyer, pointed out that the exact cause of the failure of the article sold was not disclosed by the evidence, and further, that upon the buyer showing the failure of the article under normal working conditions, did not shift the burden of proving the cause. The District Court of Appeal stated that to hold otherwise would amount to making the seller an insurer of its product.

To the same effect, Appellant cites *Cerruti Mercantile Co. v. Semi Land Co.,* 171 Cal. 254, 152 Pac. 727, wherein the seller testified that the brandy, which was the subject matter of the sale conformed to the warranties at the time it was shipped. The buyer's testimony disclosed that after considerable lapse of time, the brandy did not conform to the warranties. The Supreme Court there held that the burden was on the buyer to show the cause of the condition which breached the warranty, and that the seller's case was further supported by the presump-

tions contained in the Code of Civil Procedure 1963, subdivision 32, that is, that a thing or condition proved to be good is presumed to continue in the same condition. Of course, this presumption is rebuttable, but the appellee in the instant case has not overcome the presumption.

Applying the above cases to the facts before us, the evidence discloses that there might be many causes for the condition of the fudge sold to the appellee, such as heat, humidity and other forces of nature. [Tr. 160, 161, 275.] There was considerable evidence introduced by the Appellee that the fudge was maintained in a cool temperature, which was sometimes defined as varying from 67° to comfortable room temperature. The only evidence in the entire transcript concerning whether or not such temperatures were adequate for preserving fudge was that of Mr. Mitchell, who testified that 67° temperature was not sufficiently cool for the purpose of preserving this type of fudge. [Tr. 272.] Mr. Mitchell also testified that when the fudge was shipped from Chicago, the shipments were in a condition of quality that was superior to the sample originally shown the Appellee and equal to the sample which was subsequently shown to Appellee. [Tr. 269 and 270.] Victor Pocius, the manufacturer of the fudge, who was called as a witness on behalf of the Appellee, also testified that all the fudge shipped from Chicago was of the same condition and standard as the sample previously shipped and was made in the same manner. [Tr. 159.]

In view of this testimony, the seller (Appellant) complied with the requirements of the hereinabove cited cases by showing that the fudge was in good quality when shipped, and the Appellee completely failed to disclose any

cause for the alleged defectiveness with the one exception, to-wit: that they did not keep the fudge at a sufficiently cool temperature to preserve same for the period of time they held it.

IV.

In Order to Recover More Than the Actual Cost of Defective Merchandise, the Buyer Must Show the Elements That Compose Its Profits.

The three leading cases in support of the above statement of law are *Coates v. Lakeview Oil Co.,* 20 Cal. App. (2d) 113, 66 Pac. (2d) 463; *Roach Bros. v. Lactein,* 57 Cal. App. 379, 207 Pac. 419; *Boyles v. Kingsbaker Bros.,* 5 Cal. (2d) 68, 53 P. (2d) 141.

In *Roach Bros. v. Lactein, supra,* there was involved a breach of warranty in a sale of food commodity. The Court held that the burden was on the purchaser to show that it could not obtain a similar commodity or reasonable substitute therefor in the open market at the same price, before it would be entitled to any loss of profits as an element of its damage. This rule was also approved in both of the other above cited, more recent, cases. In both of the other cases, to-wit: *Coates v. Lakeview Oil Co., supra,* and *Boyles v. Kingsbaker Bros. Co., supra,* the Court went on to say that in any event, the loss of profits would be the net profit and not the gross differential profit.

In the instant case, there was no attempt made by the Appellee to show any of the elements of the cost of marketing, by which the Court might determine the actual net profit to be derived by the Appellee if the alleged defectiveness had not appeared in the fudge. In view of

the above cited cases, the lower Court erred in awarding any damages in the counter-claim over and above the fifty-five cents (55¢) per pound, which was the cost to Appellee of the fudge.

V.

Evidence Concerning Condition and Quality of Fudge Other Than That Delivered to Appellee Was Erroneously Admitted.

Appellant can find no cases directly in point or even close enough to be analogous to the facts involved in the instant case. However, Appellant feels that from the primary basic rules of evidence, that the testimony of Mr. Pocius, the manufacturer, concerning adjustments made between the manufacturer and the Appellant with relation to the fudge which Appellant had bought and not sold to the Appellee, was clearly outside of the issues and did not tend to prove or disprove the condition of the fudge which was sold to the Appellee.

Counsel for Appellee contended that the testimony would show that an adjustment had been made between the manufacturer and the Appellee, which included the fudge sold to Sears. [Tr. 142.] However, Mr. Pocius testified that the adjustment was made only on the invoice which he had stopped payment on subsequent to the shipments which were received by the Appellee. [Tr. 147, 156, 157 and 158.] However, the Court, in its memorandum opinion, laid great stress upon the adjustment as influencing its decision, and felt that the adjustment testified to by Mr. Pocius should have been passed on to the Appellee. The evidence clearly indicates that the adjustment was not made pursuant to the contention

made by the counsel for the buyer, as hereinabove set forth, but rather was made for other reasons, to-wit: That the shipments were coming in too late, that is, after the Christmas season, and that Appellant, as a jobber, was not in a position to dry out the moist fudge, and that the manufacturer had shipped part of the merchandise after receiving cancellation, and upon other grounds. The adjustment was made concerning only merchandise which the Appellant had in its own stockroom and which was in transit. [Tr. 283 and 284.]

VI.

The Buyer, Appellee, by Its Actions, Conduct and Statements, Was Estopped From Asserting Any Breach of Warranty, Having Waived Same.

The following facts clearly show that the Appellee, by its conduct and expressions, caused the Appellant to believe that the Appellee had no complaints concerning the fudge and would use all of same, and thereby prejudiced Appellant's position with the manufacturer:

(1) On or about November 29, 1943, Ashby advised Appellant that Appellee would not pay for the fudge. [Tr. 116, 117, 297, 298, 299.]

(2) Appellant thereafter stopped payment on his checks to the manufacturer, and this was done in the presence of Ashby, Appellee's representative. [Tr. 119, 298, 299.]

(3) On or about December 2, 1943, Ashby advised Appellant that the fudge invoices would be paid by buyer as they became due. [Tr. 301, 302, 121.]

(4) In Ashby's presence, Appellant withdrew the stop-payment order on checks to the manufacturer. [Tr. 301.]

(5) Appellant thereupon wrote a letter to the manufacturer, to-wit, Exhibit 7, which discloses a complete reliance by the seller upon buyer's new acceptance. [Tr. 301.]

(6) The above facts clearly disclose that buyer repurchased the fudge in its then known condition.

(7) Between December 2nd and 25th, 1943, buyer had a conversation with Mitchell concerning other products and, during this conversation, never mentioned that the fudge was defective, although he well knew that Mitchell was the manufacturer's representative with regard to the fudge. [Tr. 270.]

(8) Between December 2, 1942 and January 4, 1944, although Ashby saw Appellant on many occasions, his only complaint was that the fudge was "messy," "hard to handle," "was having trouble with green and inexperienced help" [Tr. 173, 306], and other mild complaints.

(9) After November 29, 1943, buyer continued to accept shipments of fudge, which is indicated by the shipping records disclosing the last shipment to arrive on or about December 6, 1943. [Tr. 254.]

(10) Buyer paid for all of the fudge invoices with one exception, which exception was because of a discrepancy in the amount shipped. [*Note*: See Ex-

hibits 14 and 15, which are the copies of vouchers attached to the invoices paid.] [Tr. 342.]

(11) Without contacting the seller, the buyer attempted to sell all of the fudge to Clark. [Tr. 104, 105, 106, 288.] (*Note*: The date of this attempted sale is in conflict since Ashby claims the attempt was made prior to his letter of January 20, 1944, but Clark discloses that that attempt was made "considerably later than January 24, 1944." Clark's testimony is corroborated by the fact that he had already bought fudge from Appellant on January 24, 1944, and that this conversation was later than that.) [Tr. 288.]

(12) Buyer attempted to have the fudge recooked by the Triangle Candy Company and this was also without notifying the seller. [Tr. 105, 106.]

VII.

The Trial Court Erred in Finding That There Was an Express Warranty.

There is absolutely no evidence of any express warranty to be found anywhere in the transcript in the testimony of any person. In fact, testimony of all the parties is directly to the contrary. Mr. Ashby admitted that the Appellant told him he had no experience or knowledge concerning bulk fudge, and further admitted that there were no expressions of warranty during any of the conversations. [Tr. 110, 111 and 267.] Therefore, there could be no express warranty.

VIII.

The Trial Court Erred in Finding That the Appellant Expressly Requested Appellee to Continue to Accept Shipments.

The above set forth finding is contained in Finding No. V. [Tr. 41.] Counsel for the Appellant has carefully read and reread the entire transcript, and has been unable to find a scintilla of evidence which would support such a finding. This finding is material and is erroneous. Said finding has a tendency to counteract the hereinabove set forth points which constitute waiver and estoppel.

IX.

The Trial Court Erred in Finding That the Adjustment Made With the Manufacturer Was Made on a Basis Which Included the Fudge Received by Appellee.

In Finding No. VI [Tr. 41], the trial court found that the adjustment made between the Appellant and the manufacturer included consideration for the defectiveness of the merchandise sold to Appellee. This finding is not supported by the evidence. Mr. Pocius, the manufacturer, testified that the adjustment was made on invoices in transit as well as the merchandise which was in the warehouse of the Appellant. [Tr. 156, 157 and 158.] Mr. Mitchell testified to the same effect. [Tr. 282, 283, 284 and 285.] Mr. Bower of Appellant testified to the same effect. [Tr. 327.] This evidence completely refutes the finding which was made by the court and that finding was stressed by Judge Yankwich in his memorandum decision. [Tr. 30, 31.]

Conclusion.

It is respectfully submitted that the judgment entered by the trial court is in error and should be modified to the extent of allowing the appellant judgment as prayed for in its complaint and as stipulated by the defendant, Appellee, to-wit: Seven thousand seven hundred thirty-eight and 99/100 dollars ($7,738.99), with interest at the rate of seven per cent (7%) per annum from January 14, 1944.

Dated, at Los Angeles, California, the 7th day of May, 1946.

Jerome D. Rolston,
Attorney for Appellant.

No. 11236.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

BOWER-GIEBEL WHOLESALE CO., a copartnership composed of Earl E. Bower and Walter Hamilton Bower,

Appellant,

vs.

SEARS, ROEBUCK AND CO., a corporation,

Appellee.

APPELLEE'S BRIEF.

FILED

JUN 15 1946

PAUL P. O'BRIEN,
CLERK

JOHN L. WHEELER,
1241 Pacific Mutual Building, Los Angeles 14,
Attorney for Appellee.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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No. 11236.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

Bower-Giebel Wholesale Co., a copartnership composed of Earl E. Bower and Walter Hamilton Bower,

Appellant,

vs.

Sears, Roebuck and Co., a corporation,

Appellee.

APPELLEE'S BRIEF.

Statement of the Case.

The findings of fact [Tr. pp. 38-43] made by the Honorable Leon R. Yankwich in the District Court of the United States would appear to afford an adequate statement of the case were it not for the fact that appellant (hereinafter sometimes referred to as seller) saw fit to make a statement of the case in its opening brief that is erroneous and misleading in that it is based (1) on appellant's partial statement of the evidence that does not reflect in any way the evidence supportng the findings made by the District Court; (2) on misstatements of the evidence; and (3) on statements that do not find support in the evidence. Under such circumstances, appellee (here-

inafter sometimes referred to as buyer or Sears), is compelled to make a more detailed statement of the case than is otherwise customary.

On October 20th, 1943, Ralph Ashby, candy buyer for Sears, at the request of Earl Bower, managing partner of seller, called at Bower's office [Tr. pp. 55, 165, 267, 291]. There, in the presence of R. E. Mitchell and Alphonse Erhart, candy brokers, Ashby was shown a 10-pound sample of Pan-O-Butter fudge. After examining the sample, which was first-class, and upon representations as to the quality made to him, Ashby, for buyer, placed an order with seller for 28,000 pounds at 55¢ a pound. [Ex. A, Tr. p. 60.] A subsequent sample was sent by the manufacturer to seller and shown to Ashby to comply with his request that the candy contain more nuts. On October 21st, 1943, seller placed an order for 200,000 pounds with the manufacturer at 50¢ a pound. (In the order dated October 21st, 1943, the manufacturer's name was McClure Co., subsequently named as Karmel Korn Komissary.) [Exs. LL and MM, Tr. pp. 329, 330.]

The first shipment of fudge was received by buyer November 15th, 1943. Subsequent shipments were received to and including December 4th, 1943. [Ex. II. Tr. pp. 253-254.] Distribution was made by Sears to its various stores in the Los Angeles district, the first candy being received in its Pasadena store on November 18th, 1943. [Ex. EE, Tr. p. 241.] On or about November 25th, 1943, as Ashby testified [Tr. pp. 63, 64],

or on November 29th, as Bower testified [Tr. p. 297], Ashby took a sample of the moist fudge received at the 9th Street store to Bower at his office. It was "extremely moist, wet." [Ashby, Tr. pp. 64, 115.] ". . . was a bagful of soft fudge like putty." [Bower, Tr. p. 314.] ". . . and is so wet and soggy that it would compare better with mush than fudge. The fudge is so moist and soft that it does not stand up under its own weight. even an inch thick." [Ex. 7.] Ashby also advised Bower that some of the fudge he examined was moldy. [Tr. pp. 128-129.] He notified Bower that he would not accept any more fudge and would stop payment on the fudge received. [Tr. pp. 117, 122.]

Thereafter Bower sent Erhart to examine the fudge and to attempt to procure its acceptance. [Ex. 7.] Erhart examined some three of four cartons of the fudge, found that it was moist, and suggested that the moist fudge would dry out if exposed to the air. [Tr. p. 169.] Ashby told Erhart he would try it and would accept a 90-pound adjustment on fudge that was examined and was definitely unsalable until all the fudge could be checked to see what part was unsalable. [Tr. p. 68.] The same day he called Bower and told him that he would try Erhart's suggeston, would sell the fudge that was salable, and a settlement would be made on the part that was unmerchantable. [Tr. pp. 70, 366-368.]

Prior to Christmas Ashby kept Bower advised as to the condition of the candy and stated on numerous occasions that the fudge was not satsfactory. [Tr. pp. 71,

330-332, 334-335, 370-371, 373.] Prior to Christmas, Bower discussed with the manufacturer the fact that Sears planned to make a claim for defective fudge. The manufacturer, according to Bower, agreed to make a settlement for it. [Tr. pp. 146, 330-332, 334-335, 370-371, 373.]

The fudge, upon its arrival at the various stores, was very moist in part, very hard in part, moldy in part, and some part of it was salable. [Tr. p. 83, Hollywood store; pp. 183-184, 9th Street store; p. 195, Vermont store; p. 204, Long Beach store; pp. 210-211, Pico store; pp. 219, 225-226, Glendale store; p. 233, San Diego Store; pp. 242-243, Pasadena Store.] Efforts were made to dry the moist fudge at Mr. Ashby's direction, but this was helpful only as to a part of the moist candy. [Ex. Y, Tr. pp. 84, 186, 188, 196, 219, 229, 247.]

On December 10th, 1943, Bower received his first shipment of fudge after delivery of the 28,000 pounds to Sears. [Tr. pp. 328, 331-332.] On December 14th, 1943, he cancelled checks issued and outstanding to the manufacturer [Tr. p. 328] and refused further shipments.

As the result of telephone calls from Bower to the manufacturer in which Bower complained of the defective fudge, including that produced by Sears, Victor Pocius, the manufacturer, came to Los Angeles prior to New Year's to settle with Bower for the defective fudge. [Tr. pp. 144, 333-336, 370-371, 373.] The manufacturer admitted that the candy examined by him in Bower's

office in December, 1943, was not merchantable. [Tr. pp. 144, 149-150, 161-162.] A settlement between manufacturer and Bower was arrived at covering the entire amount of fudge shipped by the manufacturer to Bower. [Finding VI, Tr. pp. 41, 146, 151-155, 161-163.]

On January 4th, 1944, Ashby took a 9 pound slab of the fudge to Bower's office. It was so hard that when dropped on the cement floor it did not break. [Tr. p. 72.] Bower sent Erhart and Mitchell on January 12th, 1944 to the 9th Street store. They examined with Ashby a number of the original unpacked cases of fudge in the store room. Some part was moldy, another part was dried out and chalk-like, the greater part of it (Erhart testified 70% to 75%) was not salable. [Tr. pp. 75. 171-172, 176-178, 273.] They reported to Bower, who said he would handle the matter from there. [Tr. p. 172.] On January 12th, 1944, Ashby stopped payment on the Bower-Giebel account. [Tr. pp. 127-128, 366-367.] On January 20th he wrote to Bower, demanding immediate settlement. [Ex. H, Tr. p. 100.]

The candy was properly stored and kept in unheated, cold or very cool store rooms in the retail stores. [Tr. pp. 81, 212, 221, 235-236, 246.] Stored under such conditions, the fudge, if properly prepared, should have kept from a minimum of 4 months to a year. [Tr. pp. 362, 369.]

At Ashby's request all unsalable candy was returned by the various Sears stores to the central warehouse between January 21st and January 31st, 1944. 9,620

pounds of unsalable fudge were returned to the pool stock warehouse. [Ex. KK, Tr. pp. 85, 182, 186, 194, 197, 204-205, 212, 227, 234-235, 243.] The candy was purchased to sell at 89¢ a pound and that part of the fudge that was salable that was sold prior to January 6th-January 15th, 1944, was sold at 89¢ a pound. [Tr. pp. 87, 183, 195, 213-214, 226-227, 232, 242.] The remainder of the salable candy was sold at 69¢ a pound. In computing the amount of damage for breach of warranty, the District Court allowed 69¢ a pound on the 9,620 pounds of the unsalable fudge inasmuch as the candy had been paid for in full.

Appellant's statement of the case is inaccurate and misleading in the following particulars:

1. A stipulation was not entered into that the sum of $7,738.99, together wth interest at the rate of 7% per annum from January 14th, 1944, was due, owing and unpaid to the appellant as appellant states. (App. Br. p. 3, lines 25-28.) It was stipulated that no proof would be necessary to establish the fact that goods, wares and merchandise of a value of $7,738.99 had been delivered by Bower-Giebel to Sears, and that no payment had been made for such merchandise.

2. Ashby did not testify that he did not rely upon any custom or usage in the business as appellant states. (App. Br. p. 4, lines 12-14.) Ashby testified that he did rely in part on custom and usage in the business. [Tr. p. 110.] On further examination, Ashby admitted that

in his deposition taken prior to trial he had stated that he did not rely upon any custom or usage. [Tr. p. 111.]

3. It is not true that in the original sale discussion appellant had very little to say and that most of the conversation was carried on by the appellee's representative, Mr. Ashby, and the factory representatives, Mr. Erhart and Mr. Mitchell. Mr. Mitchell, witness for appellant, testified "Mr. Bower then related to Mr. Ashby what Mr. Erhart and I had told him in regard to the fudge." [Tr. p. 267.] It is apparent from the testimony of witnesses Erhart and Mitchell, as well as Ashby, that the discussion of the fudge was carried on in large part between Bower and Ashby. [Tr. pp. 166, 267-268, 291-295.]

4. Bower did not give the factory representatives a check in the sum of $7,000 in partial payment of appellant's order to the manufacturer in the presence of Mr. Ashby, as appellee states. ((App. Br. p. 4, lines 22-26.) The record is clear that the $7,000 was sent under cover of a letter dated October 21st, 1943. [Ex. LL, Tr. pp. 328-329.]

5. It is not true that the factory representatives then called upon Mr. Ashby and showed Mr. Ashby how to handle the fudge and thereby dispose of the same, as appellant states. (App. Br. p. 5, lines 21-23.) Erhart testified that he called upon Ashby at Bower's request, found the candy wet, that he told Ashby that he believed the moisture in the fudge was caused by sweating due to high altitude and warmer climate, and that the moisture would

dry out if exposed to the air over night. [Tr. p. 169.] Ashby testified that the fudge that was examined was wet and moist and beginning to mold and in some cases was beginning to mold around the nuts [Tr. p. 66]; that he told Erhart he would attempt to dry it out but could not ascertain the amount of fudge that was unsalable without going through all of the cases; that he would go along with the 90 pound adjustment until he was able to find out exactly how much was unsalable. [Tr. pp. 66, 68, 366-368.]

6. Ashby did not advise Bower that he could use the fudge as appellant states. (App. Br. p. 5, lines 23-25.) Ashby testified that he told Bower he would use the salable part of the fudge and that a settlement would be made later as to the part of the fudge that was unsalable. [Tr. pp. 68, 70, 366-368.] Appellant did not rely upon Ashby's statement in making payment for the fudge. [Tr. pp. 331, 332, 370, 371, 373.]

7. It is not true that from December 2nd, 1943, to January 12th, 1944, the appellant received no notice that the fudge was not salable. The record is replete with instances of notice from Ashby to Bower that the fudge was unsatisfactory and unmerchantable. [Tr. pp. 68, 71, 330, 332, 334, 335, 366-367, 370, 371, 373.]

8. It is not true that Mr. Ashby admitted that he had overbought. Mr. Ashby was definite in his denial that he had ever stated that he had overbought Pan-O-Butter fudge. [Tr. pp. 126, 360, 361, 363.]

ARGUMENT.

I.

Interest Was Not Allowable to Appellant From January 14, 1944 Until Entry of Judgment on the Amount of Appellee's Counterclaim.

Appellant mistakenly construes the action of the District Court in not allowing interest from January 14th, 1944 until the date of entry of judgment on that part of appellant's claim that was offset by appellee's damage for the breach of warranty. Appellant sued to recover moneys alleged to be due from appellee. Appellee pleaded that it was not indebted to appellant by reason of the damage suffered by appellee from breach of warranty. The court found that on January 14th, 1944 the claim of the appellant for the sum of $7,738.99 was offset in the sum of $6,637.80 [Finding VIII, Tr. p. 42], and that appellant was entitled to judgment for the difference, or the sum of $1,109.19. To sustain appellant's argument would result in the allowance of interest to appellant on a sum that the District Court found was not due and owing to appellant as of January 14th, 1944. Obviously, when the debt or a part thereof is discharged, interest ceases. *Coleman v. Commins,* 77 Cal. 548, 20 Pac. 77, 80.

If the action of the District Court had the effect that appellant contends, namely, that the District Court allowed interest on appellee's counterclaim arising out of breach of warranty from January 14th, 1944 until the date of the entry of judgment, nevertheless such action would be

proper. *Brandenstein v. Jackling,* 99 Cal. App. 438, 278 Pac. 880 (hear. den.), *Barrett Co. v. Panther Rubber Mfg. Co.,* 24 F. (2d) 329 (C. C. A. 1).

Krasilnikoff v. Dundon, 8 Cal. App. 406, 97 Pac. 172, cited by appellant in its brief (page 8) does not sustain the proposition for which appellant cites it. The Court found that the damages were not certain upon the face of the contract and could not be made certain by calculation inasmuch as they were dependent upon evidence as to values in Siberia and therefore held that interest was not allowable until entry of judgment.

Armstrong v. Lassen Lumber & Box Co., 260 Pac. 810, cited by appellant in its brief (page 8) of course is not authority for any legal principle inasmuch as it was superseded for all purposes when hearing was granted by the Supreme Court.

In any event, *Brandenstein v. Jackling, supra,* being a later case, is controlling.

II.

Buyer Gave Notice of Breach of Warranty Within a Reasonable Time.

The District Court found

> "Defendant, upon discovery of the unmerchantable quality and condition of said candy and that it did not conform to the quality of the samples, immediately notified the plaintiff that the candy was of unmerchantable quality and condition and did not conform to the samples." [Finding IV, Tr. p. 40.]

and

> "Defendant continuously advised plaintiff of the unmerchantable quality of substantial portions of the

shipments of candy as such shipments were received and further, advised plaintiff that it would be required to pay defendant's losses for the unmerchantable portions of said candy." [Finding V, Tr. p. 41.]

Appellant's argument that buyer did not give notice of the breach of warranty within a reasonable time is in effect that there was no evidence to sustain the findings made by the District Court. *Federal Rules of Civil Procedure,* Rule 52-A, 28 U. S. C. A. following Section 723c, *Gates v. General Casualty Co. of America,* 120 F. (2d) 925 (C. C. A. 9), *M-G-M Corp. v. Fear,* 104 F. (2d) 892, (C. C. A. 9).

Manifestly, the evidence amply supports the findings made by the District Court. It appears that the first shipment of fudge was received by buyer at its pool stock warehouse on November 15th, 1943. Subsequent shipments were received to and including December 4th, 1943. [Ex. II, Tr. pp. 253-254.] Distribution was made by Sears to its various stores in the Los Angeles District, the first candy being received in the Pasadena store on November 18th, 1943. [Ex. EE, Tr. p. 241.] On or about November 25th, 1943, Ashby, upon complaint from the stores that part of the candy was too soft to be salable and some part of it was moldy, took a sample of the moist fudge received in the 9th Street store to Bower's office. [Tr. pp. 63, 64.] It was "extremely moist, wet," [Tr. pp. 64, 115], "a bagful of soft fudge, like putty" [Tr. p. 314], "and is so wet and soggy that it would compare better with mush than fudge. The fudge is so wet and moist that it does not stand up under its own weight even an inch thick." [Ex. 6, Tr. p. 299.]

Ashby also advised Bower that some of the fudge he examined was moldy. [Tr. pp. 65, 128-129.] He notified Bower that he would not accept any more fudge and would stop payment on the fudge received. [Tr. pp. 117, 299.] Thereafter Bower sent Erhart to examine the merchandise and to attempt to procure its acceptance. [Ex. 7.] Erhart examined some three or four cartons of fudge, found that it was moist, and suggested that the moist fudge would dry out if exposed to the air. Some of the fudge was beginning to mold. [Tr. p. 66.] Ashby told Erhart that he would accept a 90 pound adjustment on fudge that was examined and was definitely unsalable until all the fudge could be checked to see what part was unsalable. [Tr. p. 68.] The same day Ashby called Bower and told him he would try Erhart's suggestion. It was agreed that he would sell the fudge that was salable and a settlement would be made on the part that was not salable. [Tr. pp. 70, 366-368.] Prior to Christmas Ashby kept Bower advised as to the condition of the candy and stated on numerous occasions that the fudge was not satisfactory. [Tr. pp. 71, 330-332, 334-335, 370-371, 373.] Prior to Christmas Bower discussed with the manufacturer of the fudge the fact that Sears planned to make a claim for the defective fudge. The manufacturer, according to Bower, agreed to make a settlement for it. [Tr. pp. 330-332, 334-335, 370-371, 373.]

On December 30th, 1943, the manufacturer came to Los Angeles to make a settlement with Bower for the defective fudge. [Tr. pp. 144, 333-336, 370-371, 373.] The manufacturer admitted that the candy examined by him in Bower's office was not merchantable. [Tr. pp. 149-150.] A settlement between the manufacturer and Bower was arrived at covering the entire amount of the

fudge shipped by the manufacturer to Bower. [Finding VI, Tr. pp. 41, 146, 151-155, 161-163.]

On January 4th, 1944, Ashby took a 9 pound slab of fudge to Bower's office. It was so hard that when dropped on the cement floor it did not break. [Tr. p. 72.] Bower sent Erhart and Mitchell to the 9th Street store on January 12th, 1944, where they examined with Ashby a number of the original unpacked cases of fudge in the store room. Some part was moldy, another part was dried out and chalk-like, the greater part of it was not salable. [Tr. pp. 75, 171-172, 176-178, 273.] They reported to Bower, who said he would handle the matter from there. [Tr. p. 172.] On January 20th, 1944, Ashby wrote to Bower, demanding immediate settlement. [Ex. H, Tr. p. 100.]

The foregoing evidence, it is submitted, demonstrates full compliance by the buyer with the requirements of Section 1769, *Civil Code* as to character of notice given and time within which it was given in the light of the well established line of decisions in California.

Noll v. Baida, 202 Cal. 98, 259 Pac. 433;

North Alaska Salmon Co. v. Hobbs, Wall & Co., 159 Cal. 380, 113 Pac. 870, 120 Pac. 27;

Pederson v. Goldstein, 70 A. C. A. 210, 160 P. (2d) 878;

Drumar Mining Co. v. Morris Ravine Mining Co., 33 Cal. App. (2d) 492, 92 P. (2d) 424;

Brandenstein v. Jackling, supra;

Western Iron Works v. Smith, 103 Cal. App. 486, 284 Pac. 715;

Gibson v. Cruikshank, 78 Cal. App. 652, 248 Pac. 732;

Dolan v. Carmel Canning Co., 71 Cal. App. 197, 234 Pac. 926;

Ray v. American Photo Player Co., 46 Cal. App. 311, 189 Pac. 130;

Lichtenthaler v. Samson Iron Works, 32 Cal. App. 220, 162 Pac. 441.

It is significant that appellant does not cite any California cases to support his argument that buyer failed to give notice of alleged breach of warranty within a reasonable time. It is evident, however, from an examination of the evidence that the facts of the instant case fully satisfy the requirements of any of the cases cited by appellant inasmuch as the buyer not only gave notice to seller of the defective quality of the fudge, but also unmistakably advised him that the fudge was being retained only upon the understanding that a settlement for the defective fudge would be made when the full extent of its defective character was ascertained. [Tr. pp. 70, 366, 368.] On the basis of such notice Bower notified the manufacturer that Sears planned to make a claim for its defective fudge. [Tr. pp. 330-332, 334, 335, 370-371, 373.]

Truslow & Fulle v. Diamond Bottling Co., 112 Conn. 181, 151 Atl. 492, cited by appellant (Br. p. 9) is also distinguishable inasmuch as it appears that no finding had been made in the lower court that any notice of the breach of warranty had been given. The Supreme Court of Connecticut held that in the absence of an express finding it could not hold as a matter of law that the notice of

defect that had been given was a compliance with the statutory requirement. The Court's conclusion is contained in the next to the last sentence of the opinion:

> "Since neither as a matter of law nor by finding of the Court does it appear upon the record that there was a compliance with the provision of the statute requiring notice by the defendant to the plaintiff of a breach of warranty within a reasonable time, the judgment upon the counterclaim cannot stand."

Similarly, *Nashua River v. Lindsay,* 242 Mass. 206, 136 N. E. 358, cited by appellant in its brief (Br. p. 9) expressly holds that complaints as to the quality of merchandise may be found to be sufficient notice of a breach of warranty to comply with the requirements of the statute.

In a later case, *Jamrog v. H. L. Handy Co.* (Mass.), 187 N. E. 540, the Supreme Court of Massachusetts, citing the *Nashua River* case as authority, held that a finding of adequate notice to meet the statutory requirement may be based upon complaints as to quality of the merchandise. See, also, *Guthrie v. J. J. Newberry Co.* (Mass.), 8 N. E. (2d) 774.

In *American Manufacturing Co. v. U. S. Shipbuilding Board,* 7 F. (2d) 565 (C. C. A. 2), and *Wildman Manufacturing Co. v. Davenport Hosiery Mills,* 147 Tenn. 561, 249 S. W. 984, cited by appellant (Br. p. 10), it appears that delays in delivery formed the basis of the counterclaim rather than any breach of warranty involving quality of the merchandise. In these two cases it was held that notice was not given within a reasonable time under the particular circumstances before the court.

In *Bell v. Main,* 49 Fed. Sup. 689, cited by appellant in its brief (Br. pp. 9, 11), it appeared that although the merchandise (rhubarb) was received prior to March 5th, 1941, no complaint as to the quality of the merchandise was made until February, 1942. The only complaint made prior to February, 1942, was that the market was flooded and that the buyer was forced to pack the rhubarb to keep it from going to waste. The other authorities cited by appellant, when applied to the facts of the instant case, do not support a finding contrary to the one made by the District Court. Inasmuch as they are decisions of inferior courts, they will not be individually discussed.

Appellant does make certain statements of fact, however, in its brief (Br. pp. 11, 12), that do not accurately reflect the evidence and are unsupportable in the light of the findings of the District Court. Thus, appellant states:

> (1) ". . . it is unequivocable that the first complaint, to-wit, that of Ashby's conversation on or about November 29, 1943 was withdrawn on or before December 3, 1944, and that the first notice which complies with the requirements of the above cases was that of Ashby's letter of January 20, 1944." (App. Br. p. 11.)

The evidence in support of the Court's finding has been fully reviewed but it is submitted that the testimony clearly establishes that Ashby retained the fudge on the understanding that settlement would be made for that part of the fudge that was defective and unmerchantable. [Tr. pp. 70, 366-368.] Bower discussed the claim of Sears for its defective fudge prior to Christmas. [Tr. pp. 330-332, 334-335, 370-371, 373.]

> (2) ". . . The evidence clearly indicates that the appellant did not consider the mere complaints a notice. The evidence of Bower's knowledge was merely that the buyer was having sales difficulties and that it was not wholly pleased with its purchase." (App. Br. p. 11, lines 24-29.)

The evidence, on the contrary, clearly shows that Bower knew that Sears would make a claim for its defective fudge as disclosed by his conversations with the manufacturer prior to Christmas. [Tr. pp. 330-332, 334-335, 370-371, 373.]

> (3) ". . . The payment of the invoices by buyer negatives any prior complaint as constituting notice." (App. Br. p. 11, lines 29-31.)

The evidence clearly establishes in view of the findings that the invoices were paid upon the understanding that a settlement for the defective fudge would be made at the time the quantity of unmerchantable fudge was ascertained. [Tr. pp. 68-70, 366-368.] Despite appellant's statement to the contrary, nothing could be more unequivocal than appellee's conduct during this period.

> (4) ". . . The evidence clearly indicates that candy is very perishable and particularly fudge. The perishability of fudge, as disclosed by the evidence, increases with the quantity of butter and cream used to make such fudge." (App. Br. p. 12, lines 13-17.)

The testimony is that fudge of this type properly prepared would keep from a minimum of four months to a year. [Tr. pp. 362, 369.] There was no testimony that the fudge was stored at room temperatures. On the contrary, it is clear that the fudge was stored in cold locations prior to sale. [Tr. pp. 81, 212, 221, 235-236, 246.] The only candy stored at room temperature was the part of the

sample Ashby kept in his office. This did not spoil although it got hard on the outside. [Tr. pp. 58-59.]

Appellant's argument in its brief (Br. p. 12), based upon judicial knowledge of the Court and the properties of butter and cream, is contrary to the findings of the District Court that

> "Defendant stored said candy in a careful and proper manner in its retail stores and sold at retail all of said candy that was of merchantable quality." [Finding V, Tr. p. 41.]

and is without any support in the evidence.

It is clear from the facts and from the applicable California decisions that the buyer gave ample notice within a reasonable time.

III.

The Buyer, Upon Showing That Merchandise Is Defective in Breach of a Warranty, Is Not Required to Prove the Cause of the Defective Condition or That the Cause Is the Result of Seller's Action.

The District Court found

> "The candy delivered to the defendant by plaintiff was not of merchantable quality, was not fit for sale in defendant's retail business, and did not conform in quality or condition to the samples submitted to defendant at the time it purchased the candy." [Finding IV, Tr. p. 40.]

It further found that

> "Of said 28,000 pounds of candy sold to defendant by plaintiff, 9,620 pounds were of unmerchantable quality, did not conform in quality to the samples, and were unfit for sale in defendant's retail business." [Finding VII, Tr. pp. 41-42.]

Appellant's argument that it is necessary for the buyer asserting a breach of warranty to prove the cause of the condition that constitutes breach of warranty and that the cause proved results from the seller's or manufacturer's action, is not a rule of law as appellant states in its brief. (Br. p. 14.) It is merely a confusion that exists in appellant's mind from an improper analysis of the decisions that he cites. An examination of *Consolidated Pipe Co. v. Gunn.* 140 Cal. App. 412, 35 P. (2d) 350, discloses that the buyer purchased certain well casing and installed it for use in a well. The casing broke in the well. The buyer attempted to show that the casing was defective at the time he purchased it by showing that he was using the well casing under normal operating conditions at the time it broke. The Court stated that there were so many risks involved in the use of the article and the hazard of damage was so great that even though the material might not be defective, it might nevertheless break. It held that proof of breaking "under normal condition" was not proof of defective quality.

An examination of *Cerruti Mercantile Co. v. Simi Land Co.,* 171 Cal. 254, 152 Pac. 727, cited by appellant in its brief (Br. p. 14), discloses that in an action for breach of warranty the proof of the buyer was that samples of the brandy taken two years after delivery were not of the standard desired by buyer. Seller showed that two months prior to the date of delivery the brandy was of the quality warranted. The Supreme Court held that the buyer, as plaintiff, had failed to prove that the wine was not of the quality warranted at the time of delivery.

Neither of these cases is authority for the proposition for which appellant cites them. It is clear that the breach of a warranty may be established by circumstantial evi-

dence. *Vaccarezza v. Sanguinetti,* 71 A. C. A. 880, (hear. den.), 163 P. (2d) 470. The two cases relied upon by appellant are holdings to the effect that the proof offered was not sufficient to meet the requirements of circumstantial evidence in the light of the other testimony in the case. The best answer to appellant's argument on this point would appear to be found in the holding of the Court in *Beyer v. Coca Cola Bottling Co.,* 75 S. W. (2d) 462 (Mo. App.), where, in a case involving a breach of warranty occasioned by the presence of a mouse in a bottle of coca cola, the Court held that it was not necessary for the buyer to show how the mouse got into the bottle but merely to show that it was in the bottle and that the coca cola was not as warranted. In the instant case, buyer, having shown that a substantial portion of the candy was unmerchantable at the time of the receipt of the candy, is not required to show facts which were the exclusive knowledge of the seller or the manufacturer.

IV.

The Measure of Damage Employed by the District Court Was Proper.

The measure of damages for breach of a warranty of quality is provided by subsection (7) of Section 1789, *Civil Code of California.* It provides as follows:

> "(7) In the case of a breach of warranty of quality such loss in the absence of special circumstances showing approximate damage of a greater amount, is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty."

This measure of damage for the breach of warranty for quality is well established in California. The leading case is *Germain Food Company v. J. K. Armsby Co.*, 153 Cal. 585, 96 Pac. 319. In that case, there was a sale of apricots by sample. On arrival at point of delivery, the shipment was not comparable to the sample. The buyer was a dealer in fruits, having bought the apricots for resale. The lower court denied profits lost as an element of damage. The Supreme Court of California, in reversing the lower court, held that profits were a proper element of damage and that the difference in value of the apricots as received and the value of the apricots if equal in quality to the sample, was the proper measure of damage. This rule was applied in

> *Brandenstein v. Jackling, supra;*
>
> *Pacific Sheet Metal Works v. California Canneries Co.*, 164 Fed. 980 (C. C. A. 9);
>
> *Porter v. Gestri*, 77 Cal. App. 578, 247 Pac. 247;
>
> *Lichtenthaler v. Samson Iron Works, supra.*

The District Court found that

> ". . . At the time the defendant purchased said candy and at the time defendant first gave notice to the plaintiff that such candy was of unmerchantable quality and did not conform to the samples, said candy, if it had been as warranted, and if it did conform to the samples, had a reasonable value to the defendant of 89¢ a pound in its retail business." [Finding IV, Tr. p. 40.]

The District Court further found

> "Of said 28,000 pounds of candy sold to defendant by plaintiff, 9,620 pounds were of unmerchantable

quality, did not conform in quality to the samples, and were unfit for sale in defendant's retail business. Defendant notified plaintiff that said 9,620 pounds of candy were unmerchantable and unfit for sale in defendant's retail business and requested plaintiff to pay for the damage suffered by defendant by reason of the breaches of said warranties. At the time defendant notified plaintiff that said 9,620 pounds of candy were unmerchantable, said candy, if it had been as warranted, had a reasonable value to defendant in its retail business of 69¢ a pound.

"Defendant, having paid in full for said candy, was damaged by breach of said warranties in the sum of 69¢ a pound for each of said 9,620 pounds, or in the total sum of $6,637.80." [Finding VII, Tr. p. 42.]

Appellant urges that "net profits" only should be the measure of damage, citing

Coates v. Lake View Oil & Refining Co., 20 Cal. App. (2d) 113, 66 P. (2d) 463;

Roach Bros. v. Lactein Food Co., 57 Cal. App. 379, 207 Pac. 419;

Boyles v. Kingsbaker Bros., 5 Cal. (2d) 68, 53 P. (2d) 141.

Coates v. Lake View Oil Co., supra, and *Roach Bros. v. Lactein, supra,* involve anticipatory breaches of contract. A breach of a warranty of quality was not involved. The measure of damages for such a breach of contract would be determined by Section 1787, *Civil Code.* In these cases, inasmuch as the buyer had not been put to any expense, the Court held that the allowance of

gross profits as the measure of damage would result in the receipt by buyer of a larger sum as damages than he would have received if in fact he had received the merchandise. The instant case is readily distinguishable in that the merchandise had been delivered, and, as the evidence showed, was placed and held in the various stores for sale. All of the merchantable candy had been sold. In such a case, the correct rule for the determination of damage is clearly the amount represented by the difference in the value of the actual merchandise to the buyer in its unmerchantable state and the value that it would have had to the buyer if it were as warranted. The expense incident to the handling and sale of the candy had been borne by buyer and it was therefore unnecessary to segregate its cost of sale. In effect, in allowing damage in the amount of 69¢ a pound, the District Court was allowing net profits rather than gross profit as an item of damage.

In *Boyles v. Kingsbaker Bros., supra,* cited by appellant (Br. p. 16), the buyer had refused to accept pears, alleging that they did not conform to the warranty of quality. The seller sold the pears at the market price, which, at the time of sale, was lower than the contract price. Seller then sued for damage for breach of contract. The court found that the pears were of the quality warranted and that the buyer was not justified in its refusal to accept the pears. The court then held that the measure of damage was the difference between the contract price and the market price at which the pears were sold, giving consideration to the cost of marketing. Inasmuch as the seller was put to the additional expense of sale, it would appear that the court allowed the cost of marketing as an additional element of damage. The

decision does not appear to be authority for the proposition for which appellant cites it, and is further distinguishable on the basis that it also involves a breach of contract rather than a breach of warranty of quality.

V.

Evidence Concerning the Condition and Quality of Shipments of Fudge of Which That Sold to the Buyer Was a Part Was Properly Admitted.

The District Court found

> "Plaintiff purchased said candy sold to defendant from the manufacturer thereof as a part of a larger quantity of said candy. Plaintiff and the manufacturer of said candy agreed upon and plaintiff received a substantial settlement from the manufacturer because of the unmerchantable quality of said entire quantity of candy, including that sold to defendant." [Finding VI, Tr. p. 41.]

The testimony was that the 28,000 pounds of candy sold to Sears by Bower was a part of a larger order that Bower placed with the manufacturer. [Tr. pp. 142, 329, 330—Exs. LL, MM.] The manufacturer sold directly to appellant and the particular shipments made to fill the order were not consigned to any particular customer of appellant. [Tr. pp. 146, 147.] Prior to Christmas, 1943, appellant made a claim to the manufacturer for settlement for all the defective fudge, including that sold to Sears. [Tr. pp. 146, 330-332, 334-335, 370-371, 373.] Mr. Pocius, the manufacturer, came to California, examined part of the fudge that Bower had on hand, found that it was unmerchantable [Tr. pp. 149-150], and made a settlement for the entire amount of candy

shipped to appellant. [Tr. pp. 41, 146, 151-155, 161-163.] Appellant's statement of the evidence and his argument under this point is based entirely on the testimony of Bower and does not reflect the complete state of the record. There was no error in the admission of this testimony. *Yick Sung v. Herman,* 2 Cal. App. 633, 83 Pac. 1089.

VI.

Buyer Was Not Estopped From Asserting Its Breach of Warranty nor Did Buyer Waive Its Claim for Breach of Warranty.

The District Court found

> "Defendant did not estop itself from asserting its claims for damage for breaches of said warranties by its acts or conduct at any time or in any manner." [Finding XI, Tr. p. 43.]

and further found

> ". . . Defendant did not at any time expressly or impliedly agree with plaintiff to discharge plaintiff from its liability in damages to defendant for breaches of said warranty." [Finding V. Tr. p. 41.]

While appellant urges that the buyer was estopped by its actions, conduct and statements, no authorities are cited to support its argument. Neither the controlling authorities nor the evidence supports appellant's assertion.

> "One relying on a plea of estoppel must have been ignorant of the true state of facts and must have been intentionally misled by the act of the other to his injury." *Killian v. Conselho Supremo Da Uniao Portugueza,* 31 Cal. App. (2d) 497, 88 P. (2d) 214.

The evidence clearly was that Bower was not misled by buyer's acceptance of the fudge after protest. Bower knew that the buyer not only was not satisfied with the fudge but that buyer was accepting the fudge only upon the understanding that a settlement would be made for all unsalable fudge. [Pltf. Ex. 7, Tr. pp. 70-71, 146, 330-332, 334-335, 366-368, 370-371, 373.] Nor did buyer purchase additional fudge on the basis of any representation that Ashby made to him. On the contrary, Bower purchased fudge knowing that Ashby was dissatisfied. [Tr. pp. 331-332.]

Appellant's assertions and its argument on this point are identical with those made on preceding points in that they do not reflect that there was a conflict in some of the testimony and do not accurately show the state of the record or the evidence upon which the District Court relied in making its finding. Inasmuch as many of the assertions of fact made by appellant have been discussed under preceding points, it appears that it would unduly burden this brief to point out the individual inaccuracies in its statements.

Of course, the buyer did not waive its right under its notice of breach of warranty in view of the understanding that was arrived at with reference to acceptance of the fudge; namely, that a settlement would be made for the unmerchantable fudge when the amount thereof could be ascertained. The buyer, in attempting to sell the unmerchantable fudge to Clark and buyer's effort to have the fudge recooked by the Triangle Candy Company was merely an effort to minimize the buyer's damage. [Tr. p. 104.]

VII.

The Finding That There Was an Express Warranty of the Candy Is Proper.

The District Court found

> ". . . Plaintiff expressly warranted that said candy would be of merchantable quality and would be in all respects fit and proper for sale in defendant's retail business." [Finding III, Tr. p. 39.]

At this point it should be noted that there is an error in the transcript in the finding immediately following the above quoted language. The District Court further found

> ". . . Plaintiff further impliedly warranted that such candy would be of merchantable quality, would conform in quality to the samples shown to the defendant, and would be otherwise free from defects rendering said candy unsalable in defendant's retail business." [Finding III, Tr. pp. 39, 40.]

In the preparation of the transcript the word "immediately" was erroneously substituted for the word "impliedly".

Paragraph 3 appearing on the reverse side of the purchase order given by the buyer to seller contained the following under bold-faced type: "Important: Please Note and Comply With Shipping and Billing Instructions."

> "All goods not fully up to standard, or shipped contrary to instructions, . . . or substituted for merchandise ordered, or not shipped in recognized standard containers, or not as per special specifications shown hereon, may be returned or held subject to and at shipper's expense and risk." [Deft. Ex. A, Tr. p. 60.]

It is submitted that the quoted provision is adequate to sustain the Court's finding of an express warranty that the fudge would be of merchantable quality. Despite appellant's contention that Bower did not participate in the discussion as to the quality of the fudge, it clearly appears that he did make representations as to the quality of the fudge to Ashby from the testimony of Erhart and Mitchell. Thus, Erhart testified [Tr. pp. 165, 166]:

> ". . . When he (Ashby) arrived he went to Mr. Bower's desk and Mr. Bower and Mr. Ashby at that time went over the fudge sample very thoroughly. They went back and forth about the price and quality, and there was some discussion with regard to the OPA by Mr. Ashby or Mr. Bower, and Mr. Bower turned to myself and my associate, and it went along. The result of the conversation and the examination of the sample, was that Mr. Ashby gave Mr. Bower a purchase order in the amount of 28,000 pounds of fudge."

Mitchell testified [Tr. p. 267]:

> "After about an hour or so had passed Mr. Ashby arrived. I don't believe I had ever met Mr. Ashby before. Mr. Bower introduced Mr. Ashby to Mr. Erhart and myself. Mr. Bower then related to Mr. Ashby what Mr. Erhart and I had told him in regard to the fudge."

Ashby testified [Tr. p. 56]:

> ". . . Then I asked him what was in the fudge, and while Mr. Bower himself did not answer that directly, the other gentlemen who were selling the merchandise explained what was in it. They showed me the label on the fudge, which backed up their claim that it contained real butter, top quality pecan

> nuts, and the proper amount of sugar and seasoning, and various other ingredients that go into fudge. Judging from that, and, as I say, that it looked . . .
>
> "After what the gentlemen pointed out as the ingredients of the fudge, and it was on their label backing up what they said, and the appearance of the fudge was good, I then brought up the matter of price."

It is further submitted that Erhart and Mitchell, in the transaction, were acting as the agent of Bower in making the sale to Ashby and that representations and warranties made by them would be the statement of Bower for the purposes of this sale.

VIII.

The Finding That Appellant Expressly Requested Appellee to Continue to Accept Shipments of Fudge Was Proper.

The District Court found:

> ". . . At plaintiff's express request, defendant continued to accept further shipments of candy until the entire 28,000 pounds had been received." [Finding V, Tr. p. 41.]

The evidence supporting this finding has been adverted to at several prior points in the brief. Ashby had told Bower that he (Ashby) would not accept any further shipments of fudge and would stop payment on checks theretofore issued in payment of the fudge. [Tr. p. 12.] After Erhart examined some of the fudge in the Ninth Street store upon Ashby's complaint to Bower, the evidence in support of the finding is that Ashby told Erhart

that he would attempt to dry the fudge out but could not ascertain the amount of fudge that was unsalable without going through all of the cases in all of the stores; that he would go along with the 90-pound adjustment until he was about to find out exactly how much was unsalable. Ashby also told Bower that he would try Erhart's suggestion, and it was agreed that a settlement would be made on that part of the fudge that was not merchantable. [Tr. pp. 70, 366-368.]

Prior to Christmas, Bower discussed with the manufacturer that Sears planned to make a claim for its defective fudge. [Tr. pp. 146, 330-332, 334-335, 370-371, 373.] It is submitted that the evidence was ample to support the finding.

IX.

The Finding That an Adjustment Was Made by Seller With the Manufacturer on a Basis Which Included the Fudge Received by Appellee Was Proper.

The District Court found:

> "Plaintiff purchased said candy sold to defendant from the manufacturer thereof as a part of a larger quantity of said candy. Plaintiff and the manufacturer of said candy agreed upon and plaintiff received a substantial settlement from the manufacturer because of the unmerchantable quality of said entire quantity of candy, including that sold to defendant." [Finding VI, Tr. p. 41.]

The evidence in support of this finding has already been reviewed at several points in the brief. However, for the sake of clarity in the light of appellant's assertion, the evidence will be briefly reviewed again.

Prior to Christmas, Bower had several discussions with the manufacturer relating to the unmerchantable quality of the fudge and demanded a settlement. As a part of these discussions, the fact that Sears, Roebuck and Co. was making a claim for its defective fudge was discussed by Bower with the manufactturer. [Tr. pp. 144-146, 333-336, 370-371, 373.] As the result of these conversations, the manufacturer came to Los Angeles prior to New Year's. He examined the fudge in Bower's office and stated that some was unusable and some was usable. [Tr. pp. 144, 149-150.] All of the fudge in the warehouse was not examined, nor was the amount of merchantable fudge determined. A settlement was made between Bower and the manufacturer on the entire amount of fudge shipped. [Tr. pp. 146, 152-153, 162, 163.]

Conclusion.

It is respectfully submitted that the judgment entered in the District Court be affirmed.

John L. Wheeler,
Attorney for Appellee.

Dated June 13th, 1946.

No. 11237

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

United States of America,

Appellant,

vs.

Atchison, Topeka and Santa Fe Railway Company,

Appellee.

BRIEF FOR APPELLEE.

J. C. Gibson,
Charles L. Ewing,
121 East Sixth Street, Los Angeles 14,
Attorneys for Appellee.

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No. 11237

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

ATCHINSON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Appellee.

BRIEF FOR APPELLEE.

Basis of Jurisdiction.

Appellee does not question the jurisdiction of the Court.

Statement of the Case.

In accordance with the usual rule, appellee is entitled to a statement of facts in accordance with the findings of the trial court and without regard to conflicting evidence presented by appellant.

The cars in question were placed on the respective interchange tracks by the respective delivering carriers in the admitted defective condition and connected in strings or trains of cars which were not defective so as to make it impossible to move or use the nondefective cars without the movement of the defective cars.

The appellee inspected the cars on the interchange tracks, discovered the defects, and "refused to accept the cars in that condition." [R. 44, 45, 46, 47.]

The appellee disconnected the defective cars from the nondefective cars by pulling the entire train off the interchange track to its yard where switching tracks were available, did the switching necessary to separate the defective cars from the nondefective cars, and shoved the defective cars back on the interchange tracks.

The movement of the defective cars was incidental to and necessary in disconnecting them from the remaining nondefective cars and included only the minimum number of switching operations necessary to accomplish that purpose.

The method adopted by appellee to disconnect the defective cars from the nondefective cars was the most practical that could have been adopted by appellee and subjected its employees to no greater hazard than any other method which it could have adopted.

In its statement of the case, appellant says: "Appellee claims it had not accepted the defective cars." The fact is that appellant *stipulated* that appellee refused to accept these cars. [R. 44, 45, 46, 47.]

Further in the statement, appellant says: "Appellee claims" it engaged in only the incidental handling necessary to disconnect the defective cars from the nondefective cars. The whole question presented to the trial court and most of the evidence produced was on the issue as to

whether or not the admitted handling was merely incidental to disconnecting the defective cars from the nondefective cars, and the trial court found as a fact that it was necessary and incidental to this purpose on the basis of conflicting evidence; so on these points there is no longer a "claim" but a fact determined and not subject to review.

Questions Involved.

Appellant's statement of the questions involved is argumentative and incorporates questions concerning facts found adverse to it by the trial court. Stripped of these fact questions as it must be for review by this Court, only one question remains, namely: Is it permissible under the Safety Appliance Act for a receiving carrier to make the switching movements necessary to disconnect a defective car from other nondefective cars when such defective car is placed on an interchange track by another carrier, so coupled with nondefective cars as to make it impossible to use the nondefective cars without the incidental movement and switching of the defective car?

That this is the sole question remaining before this Court is indicated by a brief examination of appellant's statement of points relied on.

1. Appellant claims the court below erred in finding that appellee refused to accept the cars in their defective condition. Appellant stipulated that appellee refused to accept these cars. [R. 44, 45, 46, 47.]

2. Appellant claims the court below erred in holding the movement of cars was incidental and necessary in disconnecting them from the remaining nondefective cars and returning the defective cars. Practically the entire testimony below was directed to the question as to whether or not the movements performed were necessary and incidental; and the testimony of appellee's Witness Kingston [R. 51 to 88, incl.] amply supports the court's finding in this regard.

3. Appellant claims the court below erred in finding that only the minimum number of switching operations necessary to disconnect the defective cars was performed. This finding was based not only on the testimony of appellee's Witness Kingston [R. 62] but also on the testimony of appellant's Witness Hynds. [R. 107, 108.]

4. Appellant claims the court below erred in finding that the method of disconnection adopted by appellee was the most practical under operating conditions prevailing. This finding is abundantly supported by the testimony of Witness Kingston. [R. 55 to 88, incl.]

5. Appellant claims that the court below erred in finding that the method of disconnecting adopted by appellee subjected its employees to no greater hazard than any other possible method. The nature of the defects stipulated to were such as to subject employees to the hazard of going between cars in coupling and uncoupling and, in the one case, the use of a bent grabiron in coupling and uncoupling. Obviously, the hazard existed only at the time coupling and uncoupling was being performed and this,

of course, took place only in connection with switching movements. Since the minimum number of switching movements was made that could have been performed by any other method [Kingston, R. 62; Hynds, R. 107, 108], the trainmen were obviously not subjected to any greater hazard than they would have been subjected to by any other method of switching that might be suggested; and the court was, therefore, amply justified in making this finding.

6. Appellant claims the court erred in finding that other suggested methods of switching would subject other employees and the public to greater hazard than the method employed. This finding was, of course, not necessary to support the judgment on any theory; but, in any event, it was abundantly supported by the testimony of Witness Kingston. [R. 55 to 88, incl.]

7, 8, 9, 10 and 11. These specifications of error, except where they refer to findings of fact heretofore discussed, are addressed to the conclusions of law of the trial court and present only the one issue of law already asserted by appellee, that is, is a movement of a defective car necessary to disconnect it from nondefective cars in order to obtain the nondefective cars under the stated conditions, a permissible movement under the Safety Appliance Act?

ARGUMENT.

I.

Facts Found by the Trial Court Are Conclusive on Appeal.

Since the facts found by the trial court and complained of by appellant are supported either by stipulation of the parties or by conflicting evidence, they are not open to review by this Court. Rule 52a, *Rules of Civil Procedure,* provides:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

That this rule constitutes simply a reiteration of the familiar rule existing before the adoption of the Federal Rules, namely, that the findings of a trial court where based upon conflicting evidence are presumptively correct and unless some obvious error of law or mistake of fact has intervened they will be permitted to stand, is clearly held in the decision of this Court in *Wittmayer v. United States* (C. C. A. 9, 1941), 118 F. (2d) 808.

II.

The Incidental Movements of Defective Cars Necessary to Disconnect Them From Nondefective Cars in Order to Use the Nondefective Cars When Such Defective Cars Have Been Placed on an Interchange Track by Another Carrier, Coupled With Nondefective Cars, Is Not a Violation of the Safety Appliance Act.

This proposition is the fundamental proposition involved in this case and appellee contends this is the only issue before this Court. It is interesting to note the subtle manner in which the appellant has changed its position with regard to this issue, as compared with its presentation to the trial court. Actually, this proposition of law was admitted by appellant in the trial below when counsel for appellant said:

> "The incidental hauling that was necessary to disconnect the bad-order cars from the good-order cars we don't raise any question as to law in that case. The 6th and 9th circuit have passed on that, and I think they have not only laid down good law, but they have laid down good common sense." [R. 75, 76.]

Again in appellant's brief before the trial court the same statement was repeated. It will be noticed that the defendant's Answer, which was in the nature of a confession and avoidance, admitted the handling of these cars and only alleged, "that such handling * * * was the mere incidental handling necessary to disconnect the same from the cars which were not defective."

[R. 7, 8, 9, 10, 11, 12.] No motion to dismiss or any claim by other pleading that this Answer failed to constitute a defense was ever interposed; rather, the entire theory of the Government at the trial of the action was that the necessity for the switching movements should have been determined adversely to appellant. It now, at least inferentially, disclaims its admission as to the existence of this exception to the literal terms of the Safety Appliance Act and cites numerous cases to the effect that no movement of a defective car is permissible. (Appellant's Brief, p. 9.) It does not yet, however (possibly because of the inconsistency of such a position) contend that the rule heretofore stated and announced by the Sixth Circuit Court of Appeals in *Baltimore & O. S. W. R. Co. v. United States* (1917), 242 Fed. 420, and *United States v. Louisville & J. Bridge & R. Co.* (1924, 1 F. (2d) 646, and by this Court in *United States v. Northern Pac. Ry. Co.* (1924), 293 Fed. 657, is not the law but rather it attempts to distinguish those cases from the case at bar.

Appellee has not been able to discover, nor has appellant cited any cases, discussing the exact question involved in this case with the exception of the three cases cited above. All of the cases cited by appellant for its proposition that literal compliance with the Safety Appliance Act is required deal with a fact situation not in any degree similar to that presented by the case at bar, nor do the courts in any of those cases discuss by way of dicta, or otherwise, the proposition contended for in this case. Appellee's entire case is based upon the three cases cited above and the fundamental law upon which they are grounded, and is in accord with the statement of appellant's counsel made at the time of the trial before the lower court, namely,

that the courts in those cases have "not only laid down good law, but they have laid down good common sense." [R. 75, 76.] The first case to announce this exception to the harsh rule now contended for by appellant was *Baltimore & O. S. W. R. Co. v. United States* (C. C. A. 6, 1917), 242 Fed. 420, when that court made the statement quoted in appellant's brief, page 12:

> "We add that, in our opinion, in case a defective car is received from a connecting carrier in a string or train of cars, the mere incidental handling of such car by the receiving carrier, refusing to accept it, in such manner as may be necessary to disconnect it from the other cars for redelivery to the connecting carrier and to proceed with the use of the other cars, would not be a use or hauling of such defective car by the receiving carrier which would subject it to the penalties of the Act; such incidental handling of the car not being in contravention of the purposes of the Act, but a necessary step in furtherance thereof."

Appellant in its brief goes to some length to show that this quoted language was only dicta in that case. Appellant admits that this language is dicta, but simply contends that the rule stated is nevertheless sound.

This Court, in *United States v. Northern Pac. Ry. Co.* (C. C. A. 9, 1924), 293 Fed. 657, said:

> "Under the law the defendant in error was forbidden to haul this car over its lines any distance, for any purpose, because the defect arose on the lines of another carrier. * * * True, the act does not prohibit a mere incidental movement, such as a movement for the purpose of reaching other cars on the exchange track, as held in Baltimore, etc., Ry. Co. v. United States, 242 F. 420, 155 C. C. A. 196; but this was not such a movement."

It is quite apparent from the foregoing quotation itself that this Court's announcement of the exception for which we are now contending was in the nature of dicta but, dicta or not, the rule stated is not only good law but good common sense.

With respect to the last of these three cases, however, no question of dicta is involved. This case, *United States v. Louisville & J. Bridge & R. Co.* (C. C. A. 6, 1924), 1 F. (2d) 646, had to decide and did decide that incidental handling necessary to disconnect a defective car from non-defective cars in order to use the nondefective cars and return the defective one, and after such a string of cars had been placed upon an exchange track, constituted an exception to the literal language of the Safety Appliance Act. Appellant, in attempting to distinguish this case from the case at bar, reveals its purpose in its repudiation of its stipulation in the trial court to the effect that appellee refused to accept the defective cars [R. 43, 44, 45, 46, 47] in now contending that the receiving carrier in *United States v. Louisville & J. Bridge & R. Co., supra,* found the cars in its yard and merely shoved them back to the delivering carrier; whereas, appellant in this case took the cars from the line of the delivering carrier onto its own line and thereby accepted the cars. Even aside from the repudiation of the stipulation involved which should be binding on appellant here, *Brown v. Gurney* (1906), 26 Sup. Ct. Rep. 509, 201 U. S. 184, 50 L. Ed. 717, the distinction sought to be made is wholly artificial and based upon minute factual differentiation; it amounts to the difference between tweedledee and tweedledum. A brief review of *United States v. Louisville & J. Bridge & R. Co., supra,* will indicate that it is on all fours with the case at bar as far as the applicable principle of law is involved. In *United States v. Louisville & J. Bridge & R. Co., supra,*

the defective car and other cars were placed upon the terminal company's "interchange track." In the case at bar, the cars were placed upon the interchange tracks between appellee and the delivering carriers. There was no more necessity for the terminal company's handling of the defective cars in that case than there was for appellant's handling of the defective car in this case. Certainly the location of the interchange track would not change this necessity. The terminal company could have as easily foregone the use of the nondefective cars with possible damage to their contents, while waiting for the Illinois Central to come and switch out the defective cars, as appellant could have foregone the use of the nondefective cars and the possible deterioration of their contents while waiting for the delivering carriers to switch out the defective cars. As far as the movement itself is concerned, the terminal company in *United States v. Louisville & J. Bridge & R. Co., supra,* had to pull the cars off of the interchange track, a distance which does not appear, switch out the defective car, place it on some adjacent track, then some hours later pick it up with a string of other cars, shove it back on the interchange track and then beyond the interchange track for a distance, as indicated by the court's reference to the case of *Louisville & J. Bridge Co. v. United States,* 249 U. S. 534, 39 Sup. Ct. Rep. 355, 63 L. Ed. 757, "of over three-quarters of a mile, and involved crossing, at grade, three city streets once, two streets twice, one street three times, and a main track movement of at least 2,600 feet, with two stops and startings on the main track." In the case at bar, appellee merely pulled the string of cars in one continuous movement off of the interchange track back to its Mormon Yards, cut out the defective car, and in one continuous movement shoved the defective car back to the interchange track. Appellee's

movement of the defective car involved actually far less handling than the movement which was approved in *United States v. Louisville & J. Bridge & R. Co.* (C. C. A. 6, 1924), 1 F. (2d) 646.

The decision in *United States v. Louisville & J. Bridge & R. Co.,* supra, and the dicta of this Court and of the Circuit Court of Appeals for the Sixth Circuit, in the two other cases heretofore discussed and relied upon by appellee, are based upon a sound principle of statutory construction. If the Court should hold that this right of incidental handling is not permissible under the Safety Appliance statute, it would result in absurd consequences. It would mean that a carrier would be forced to permit large numbers of cars containing all manner of cargoes, perishable and otherwise, to remain standing on interchange tracks until the delivering carriers should come to switch out the defective cars, even though in so doing the delivering carriers would have to go through approximately the same type and number of switching movements as the receiving carrier would have to perform in order to use the non-defective cars. Even the literal interpretation suggested by appellant would not require such a result.

The literal application of a statute which leads to absurd consequences is to be avoided wherever possible. *United States v. Ryan*, 52 Sup. Ct. 65, 284 U. S. 167, 76 L. Ed. 224; *United States v. Katz,* 46 Sup. Ct. Rep. 513, 271 U. S. 354, 70 L. Ed. 986.

It is also true that "a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *Church of the Holy Trinity v. United States,* 12 Sup. Ct. Rep. 511, 143 U. S. 457, 36 L. Ed. 226.

"All statutes must be construed in the light of their purpose. A literal reading of them which would lead

> to absurd results is to be avoided when they can be given a reasonable application consistent with their words and with the legislative purpose." *Haggar Co. v. Helvering,* 60 Sup. Ct. 337, 308 U. S. 389, 84 L. Ed. 340.

It is submitted that the exception to the literal application of the Safety Appliance Act, contended for by appellee, is supported by the only authorities in point on the question and that those authorities are well grounded in law and "based on common sense."

III.

Appellant's Contention That a Movement for One Purpose Being Unlawful, a Movement for Any Other Purpose Would Likewise Be Unlawful.

Appellant, in its brief, page 17, insists that since appellee could not have hauled the cars in question over the tracks where it did haul them for the purpose of repair, then it likewise could not haul the cars over the same tracks in an incidental movement necessary to disconnect the defective cars from the nondefective cars. This argument is appealing at first blush but has no real merit in view of the necessities of the case. There would have been no compelling necessity in the absence of the other circumstances mentioned for appellee to have hauled the cars for the purpose of repair, and such an unnecessary movement would be, therefore, in violation of the statute regardless of what tracks the movement was made over. The movement actually made, however, was made because of the necessities involved in disconnecting the defective cars from the nondefective cars, and it is this necessity which gives rise to the exception contended for, not the tracks over which the movement was made. Appellant

could just as readily contend that the defendant in *United States v. Louisville & J. Bridge & R. Co., supra,* could not be heard to say that it could make the movements necessary to disconnect and return the defective cars if it could not make the same movement for the purpose of repairing the cars. The mere fact that the same movement or even a shorter movement might be prohibited under other circumstances is no reason why such a movement should be prohibited under the necessities involved in the case at bar.

IV.

Appellant's Comments on the Opinion of the Trial Court.

It is, of course, not necessary to argue and support every comment made by the trial court in its decision, for the reason that where the decision of the trial court is correct it must be affirmed though the lower tribunal may give a wrong reason. *J. E. Riley Investment Company v. Commissioner of Internal Revenue,* 61 Sup. Ct. 95, 311 U. S. 55, 85 L. Ed. 36; *Securities and Exchange Commission v. Chenery Corporation,* 63 Sup. Ct. 454, 318 U. S. 80, 87 L. Ed. 626.

On page 21 of its brief, appellant suggests that the trial court excused appellee's actions on the basis of its good faith, which appellant says is not a sufficient excuse. Appellant overlooks the fact that the trial court had before it not only the single question of law before this Court on appeal, and which was admitted in the trial court, but that the trial court had the question of fact, first, as to whether or not the handling of the car was only incidental and necessary to its disconnection from other cars, and the additional contention made by appellant that the switching movements should be performed at some point other than

the place where they were actually performed. The comments of the court in this connction really go only to the good faith of appellee in its selection of the particular switch where the switching was to be done.

With reference to paragraph 2 of the court's opinion, appellant in its brief, page 22, cites authority supposedly for the position that the defective cars involved here were in use by appellee under the facts of the case at bar. The first of these cases, *Brady v. Terminal Railroad Assoc.*, (1938), 303 U. S. 10, 82 L. Ed. 614, was a suit for a personal injury against the carrier which had placed a defective car on an interchange track, that would have been the delivering carrier in the case at bar, and it was held that the car was in the use of the carrier which placed it on the interchange track. It is also to be noted that the same plaintiff had brought suit against the receiving carrier, that is, the one who would have been in the same position as the appellee in this case, and that suit was lost, it being held that the receiving carrier was not using the car in question; so that appellant's citation of authority bolsters the trial court's suggestion (made by way of inducement only) that the car in question was in the use of the delivering carriers and not this appellee. The other cases cited by appellee on this point, that is, *Chicago Great Western R. R. v. Schendel* (1925), 267 U. S. 287, 69 L. Ed. 614; *Minneapolis, St. Paul & S. S. Marie Ry. v. Goneau* (1926), 269 U. S. 406, 70 L. Ed. 335; *Cusson v. Canadian Pacific Ry.*, 115 F. (2d) 430, all involve cases of cars becoming defective on the line of the carrier involved, except the last case and that was one in which a defective car on another line was being used in switching movements not involving the defective car.

Appellant attacks the trial court's opinion, paragraph 4, in its brief, pages 23, 24, and 25, on the theory that there

is no room for any construction of the Safety Appliance Act other than the harsh and literal construction contended for by appellant. The argument of the court in this paragraph and the authorities which it cites are authorities directed toward the basic proposition that an absurd or unreasonable result should not be arrived at and that a statute should be open to construction as well as interpretation. The arguments of the court in this regard are in effect a discussion of fundamental principles leading to the acceptance of the principles announced in *United States v. Northern Pac. Ry. Co., supra; United States v. Louisville & J. Bridge & R. Co., supra;* and *Baltimore & O. S. W. R. Co. v. United States, supra,* and as such are not detracted from by appellant's citations of the same list of cases cited at the beginning of its argument (App. Br. p. 9) requiring, under other circumstances and in the absence of the necessities involved in the case at bar, literal compliance with the statute.

Appellant attacks paragraph 5 of the court's opinion, page 25 of its brief, for having suggested that Congress intended some leeway when it enacted section 13 of the Safety Appliance Act relating to repair, and wherein the trial court comments that judicial discretion is involved to determine where the nearest available point is and what a reasonable movement consists of. Appellant apparently has entirely misconstrued the purpose of the trial court in mentioning these considerations. Appellee believes that the court was simply using this by way of analogy to show that some judicial discretion is involved in the application of any statute, some discretion over and above that which appellant contends is completely and entirely vested in "the executive officers." It is true that judicial discretion would be involved in applying section 13 of the Safety Appliance Act to enable a court to determine whether or not a fact

situation came within section 13; and, likewise, judicial discretion must be exercised in the case at bar to determine whether or not the facts in this case. where no repairs are involved, bring it within the spirit and meaning of the prohibitions contained in the Safety Appliance Act. It is at this point that appellant belatedly takes the position that the receiving carrier has no remedy but to sit and wait until the delivering carrier comes and switches out the defective cars, and by taking this position appellant now repudiates its own statement of the law as made to the trial court, repudiates the three cases upon which appellee relied in the trial court, that the trial court relied upon in its opinion, and which appellee continues to rely upon in this Court, namely, *United States v. Louisville & J. Bridge & R. Co., supra; United States v. Northern Pac. Ry. Co., supra;* and *Baltimore & O. S. W. R. Co. v. United States, supra.*

On pages 26, 27 and 28 of its brief, appellant complains about the trial court's mention of the wartime conditions under which the alleged violations occurred. This mention, of course, would in no manner be necessary to support the judgment of the court. However, it would seem entirely proper to mention the extremely difficult conditions under which appellee was operating not in order to change the Safety Appliance Act nor to announce any new or different rules of law, but rather that the necessities of the case as contended for by appellee were real and not imaginary. In this portion of its brief, the Government again emphasizes the distance of the movement of the cars involved. This, seemingly, is the factor which appellant continually complains about. In fact, the length of the movement involved bears no relation whatever to the purposes of the Safety Appliance Act, which is admittedly

for the purpose of protecting railroad employees from injury. During any or all of the time that these cars were in motion, coupled together as a train, they presented no hazard whatever to railroad employees. If any hazard at all was involved, it was involved at such times as employees might be engaged in uncoupling the defective cars and thereby going between them. If appellant reasonably thought that more hazard was involved in the movement performed in this case than might be involved in some other movement, its contention would have been that the appellee made more than the necessary number of switching moves with the cars, thereby increasing the number of couplings and uncouplings to be made, and increased thereby the hazard to employees. This it cannot do, either under the facts or under the findings of the trial court, and yet it insists that a dangerous precedent is involved because of the movement of the cars for less than a mile in either direction. The distance involved is of no bearing whatever.

On page 27 of appellant's brief, appellant again reiterates that there is no room for any reasonable or practical construction of the literal terms of the statute and, on page 28 of the brief, appellant contends that the thread of inconvenience runs through the case and is the basis for the trial court's decision. In order to understand these references by the trial court to matters of reasonableness, inconvenience, etc., it is necessary to again notice the manner in which the issues were presented to the trial court. In the first place, the Government had agreed that incidental movements were permissible. [R. 75, 76.] It then attempted to show that the switching movements should have been performed at some switch nearer the transfer tracks than the Mormon Yard in order to make out its

case that the movements involved were not merely incidental. Appellee's position then was that the incidental movements, if performed in accordance with reasonable operating practices involving no more switching movements than would be performed at the switches designated by appellant, would be in accordance with the agreed principle of law that incidental movements are permissible. Once having admitted the existence of the exception and as soon as it was ascertained that the switching movements involved represented only the minimum number necessary to accomplish the permitted object, then the selection of the particular switch where the movements were to be performed should be left to determination under operating conditions existing and the Government should not be permitted to say that the necessary and incidental switching should have been performed at some other switch. Once the movements appear to be within the exception, some choice in the manner of their performance must be allowed; otherwise, the Government could always contend that the switching should have been performed at some other switch, just as it did in this case. The court's references to the operating conditions, reasonableness, convenience, etc., all relate to this question of appellee's choice of the point where the necessary switching was to be performed, not the question as to whether or not necessary switching incidental to disconnecting defective cars from nondefective cars is permissible under the statute. The court's opinion amounts simply to this: First, it is permissible to make the switching movements necessary to disconnect the defective cars on the authority of the three cases heretofore discussed and under the general principles of statutory construction. Second, the switching movements performed by appellee were only the minimum num-

ber of movements necessary to perform this permitted objective. Third, appellee's choice of the place where this switching should be done came not only within the requirements of the necessities of the situation but in addition was reasonable and practical under the circumstances existing.

Conclusion.

The announced principle of law that a carrier may perform switching movements necessary and incidental to reaching and using nondefective cars when they are placed upon a transfer track by another carrier, coupled with defective cars, is well supported by reason and authority; that the movements performed in the case at bar were incidental and necessary to such disconnection has been determined by the trial court on the basis of stipulations and conflicting evidence, and is, therefore, not reviewable by this Court, and it, therefore, follows that the decision of the trial court should be affirmed.

Respectfully submitted,

J. C. Gibson,
Charles L. Ewing,
Attorneys for Appellee.

No. 11238

United States Circuit Court of Appeals

For the Ninth Circuit.

ZEREFA MALOOF,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

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No. 11238

United States Circuit Court of Appeals

For the Ninth Circuit.

ZEREFA MALOOF,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

Rotary Colorprint, 661 Howard Street, San Francisco

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

LEO R. FRIEDMAN,

Russ Building,

San Francisco, California.

Attorney for Defendant and Appellant.

FRANK J. HENNESSY,

United States Attorney,

Northern District of California.

Post Office Building,

San Francisco, California.

Attorneys for Plaintiff and Appellee.

In the Southern Division of the United States District Court for the Northern District of California.

No. 29916-R

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ZEREFA MALOOF,

Defendant.

INFORMATION

(Emergency Price Control Act of 1942, as amended; Title 50 U.S.C.A. App., Sections 902, 904(a) and 925(b).)

Leave of Court being first had, Frank J. Hennessy, United States Attorney for the Northern District of California, comes, and for the United States of America informs this Court: That Zerefa Maloof, (hereinafter called "said defendant") on or about the 15th day of December, 1945, in the City and County of San Francisco, State of California, in the Southern Division of the Northern District of California, and within the jurisdiction of this Court, did unlawfully, wilfully and knowingly rent to B. E. Wood and R. D. Sullivan a certain room in a hotel and rooming house, to-wit, Room No. 11, Hotel Rosslyn, 44 Eddy Street, City and County of San Francisco, State of [1*] California, for a rental price of $5.00 per night for

* Page numbering appearing at foot of page of original certified Transcript of Record.

two persons, which said sum of $5.00 per night for two persons was higher than the maximum price fixed by law, said maximum price then and there being $2.00 per night for two persons, as the said defendant then and there well knew. (Regulations for Hotels and Rooming Houses, 9 F. R. 11322.)

/s/ FRANK J. HENNESSY,
United States Attorney.

(Verification by William F. Lange.)

[Endorsed]: Presented in Open Court and Ordered Filed Dec. 28, 1945. [2]

District Court of the United States, Northern District of California, Southern Division

No. 29916-R

UNITED STATES

vs.

ZEREFA MALOOF.

Criminal Information in One count for violation of Emergency Price Control Act of 1942, as amended; Title 50 U.S.C.A. App., Sections 902, 904(a) and 925(b).

JUDGMENT AND COMMITMENT

On this 21st day of January, 1946, came the United States Attorney, and the defendant, Zerefa

Maloof, appearing in proper person, and by counsel, and,

The defendant having been Adjudged Guilty by the Court of the offense charged in the Information in the above-entitled cause, to wit: Viol. Title 50 USCA App., Sections 902, 904(a) and 925(b). Defendant did, on or about December 15, 1945, in San Francisco, California, unlawfully rent to two certain individuals a room for the rental price of $5.00 per night for two persons, which price was in excess of the maximum price fixed by law for such accommodations, and the defendant having been now asked whether she has anything to say why judgment should not be pronounced against her, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of Sixty (60) Days, and pay a fine to the United States of America in the sum of Three Hundred (300.00) Dollars.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

Examined by:

JOSEPH KARESH,
Assistant U. S. Attorney.

/s/ WILLIAM HEALY,
United States District Judge.

The Court recommends commitment to a County Jail.

Filed and Entered this 21st day of January, 1946.

/s/ C. W. CALBREATH,
Clerk.

(by) JOHN J. DRISCOLL,
Deputy Clerk. [3]

[Title of Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant—Zerefa Maloof, 44 Eddy Street, San Francisco, California.

Name and address of appellant's attorney—William Klein, 110 Sutter Street, San Francisco 4, California.

Offense: Violating Emergency Price Control Act of 1942, as amended; Title 50 U.S.C.A. App., Sections 902, 904(a) and 925(b).

Date of Judgment: January 21, 1946.

Brief description of judgment or sentence: Sentenced to sixty days in the County Jail and to pay a fine of Three Hundred ($300.00) Dollars.

Name of prison where now confined, if not on bail —County Jail, City and County of San Francisco.

I, the above-named Appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above-mentioned on the grounds set forth below.

/s/ ZEREFA MALOOF.

Dated: San Francisco, California, January 21, 1946.

GROUNDS OF APPEAL

1. Errors of law committed during the trial of the above-entitled matter.

2. That the judgment of the Court is not supported by the evidence.

(Receipt of Service.)

[Endorsed]: Filed Jan. 22, 1946. [4]

[Title of District Court and Cause.]

DESIGNATION OF POINTS AND ASSIGNMENT OF ERRORS

Now comes Zerefa Maloof, the defendant in the above-entitled cause, who has heretofore appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment and sentence heretofore given, made and entered against her in and by the said District Court in the cause entitled

and numbered as above, and having heretofore duly given her notice of appeal in the manner and form provided by law and by the rules of the Supreme Court of the United States governing appeals in criminal cases, files this, her assignment of the errors upon which she will rely for the reversal of the judgment and sentence aforesaid, and says that in the record and proceedings aforesaid, as also in the judgment of the plea herein, manifest error hath happened to the grievous damage of her, the said Zerefa Maloof, in each and every of the following particulars, to-wit:

I.

That the information in the above-entitled cause does not [5] state facts sufficient to charge this defendant with any crime or offense against the United States of America.

II.

That the said District Court had no jurisdiction to hear or determine the above-entitled cause for the reason that the Regulations for Hotels and Rooming Houses (9 F. R. 11322) are void for uncertainty, and are so indefinite and vague that no person can ascertain therefrom what rentals can or may be charged thereunder, and that this defendant and all other persons affected thereby are compelled to speculate as to the meaning thereof at the peril of their liberty and property; and that the conviction of this defendant on said information and the judgment and sentence pronounced on said conviction deprive this defendant of her

liberty and property without due process of law within the meaning of the Fifth Amendment to the Constitution of the United States.

Wherefore, the said defendant, Zarefa Maloof, prays that the aforesaid judgment of said District Court be reversed and that she may go hence without day.

Dated March 22, 1946.

/s/ ZAREFA MALOOF,
Defendant and Appellant.

/s/ LEO R. FRIEDMAN,
Attorney for Defendant and Appellant.

Service admitted March 22, 1946.
/s/ FRANK J. HENNESSY,
United States Attorney,
Per T. S.

[Endorsed]: Filed Mar. 22, 1946. [6]

[Title of District Court and Cause.]

ORDER DIRECTING FILING OF ASSIGNMENT OF ERRORS, AND FORWARDING OF RECORD TO CIRCUIT COURT OF APPEALS.

(Rule 8, Criminal Appeals Rules)

It appearing from the record herein and from the application of counsel for the defendant in this cause that the appeal of the said defendant from

the judgment herein to the United States Circuit Court of Appeals for the Ninth Circuit is to be prosecuted upon the clerk's record of proceedings without a bill of exceptions, it is hereby ordered by the undersigned trial judge that the said defendant and appellant be, and she is hereby directed to file with the clerk of the trial court on or before the 29th day of March, 1946, a statement of points and assignment of errors of which she complains, and the clerk of said court is hereby directed to forward promptly, with his certificate, to said Circuit Court of Appeals, the above-mentioned record and assignment of errors.

Dated March 22, 1946.

WILLIAM HEALY,
United States Circuit Judge, sitting herein as a District Judge.

[Endorsed]: Filed Mar. 26, 1946. [7]

District Court of the United States,
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 7 pages, numbered from 1 to 7, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of United States of

America, Plaintiff, vs. Zerefa Maloof, Defendant, No. 29916-R, as the same now remain on file and of record in my office, together with the original Designation of Points and Assignment of Errors.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of $1.60 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 27th day of March, A. D. 1946.

[Seal] C. W. CALBREATH,
Clerk.

By M. E. VAN BUREN,
Deputy Clerk. [8]

[Endorsed]: No. 11238. United States Circuit Court of Appeals for the Ninth Circuit. Zerefa Maloof, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed April 5, 1946.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 11,238

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ZEREFA MALOOF,	
	Appellant,
vs.	
UNITED STATES OF AMERICA,	
	Appellee.

OPENING BRIEF FOR APPELLANT.

LEO R. FRIEDMAN,
Russ Building, San Francisco 4, California,
Attorney for Appellant.

FILED
MAY 27 1946
PAUL P. O'BRIEN,
CLERK

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No. 11,238

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ZEREFA MALOOF,	
	Appellant,
vs.	
UNITED STATES OF AMERICA,	
	Appellee.

OPENING BRIEF FOR APPELLANT.

The appellant, convicted in the District Court for the Northern District of California of violating the Emergency Price Control Act of 1942, and sentenced to pay a fine of $300 and to be imprisoned in the county jail for a period of sixty days, has duly appealed to this Court upon an assignment of errors, and upon the clerk's record of proceedings, without a bill of exceptions, pursuant to the provisions of Rule 8 of the Criminal Appeals Rules.

JURISDICTIONAL STATEMENT.

The statutory provisions which sustain the jurisdiction are as follows:

(1) The Jurisdiction of the District Court.

U.S.C.A., Title 28, section 41 subdivision 2. This section provides that the District Courts shall have original jurisdiction of "all crimes and offenses cognizable under the authority of the United States." Also, the *Constitution of the United States, Amendment 6:*

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed."

(2) The Jurisdiction of this Court upon Appeal to Review the judgment in question.

U.S.C.A., Title 28, section 225:

> "The Circuit Courts of Appeals shall have appellate jurisdiction to review by appeal final decisions,—
>
> "**First,** in the District Court, in all cases save where a direct review of the decision may be had in the Supreme Court, under section 345 of this Title."

(3) The pleadings necessary to show the existence of jurisdiction:

(a) The Indictment (R. 2.)

(4) The facts disclosing the basis upon which it is contended that the District Court had jurisdiction and that this Court has jurisdiction upon appeal to review the judgment in question:

These facts are set forth in the introductory sentences to this brief and will be stated more fully

in the ensuing abstract of the case. Accordingly, in the interest of brevity, and to avoid repetition, statement thereof is here omitted.

ABSTRACT OF THE CASE.

The information filed against appellant by the United States Attorney for the Northern District of California, omitting the caption, is as follows (R. 2):

"INFORMATION.

(Emergency Price Control Act of 1942, as amended; Title 50 U.S.C.A. App., sections 902, 904(a) and 925(b).)

Leave of Court being first had, Frank J. Hennessy, United States Attorney for the Northern District of California, comes, and for the United States of America, informs this Court: THAT

ZEREFA MALOOF,

(hereinafter called 'said defendant') on or about the 15th day of December, 1945, in the City and County of San Francisco, State of California, in the Southern Division of the Northern District of California and within the jurisdiction of this Court, did unlawfully, wilfully and knowingly rent to B. E. Wood and R. D. Sullivan a certain room in a hotel and rooming house, to-wit, Room No. 11, Hotel Rosslyn, 44 Eddy Street, City and County of San Francisco, State of California, for a rental price of $5.00 per night for two persons, which said sum of $5.00 per night for two persons was higher than the maximum price fixed by law, said maximum price then and there being

$2.00 per night for two persons, as the said defendant then and there well knew. (Regulations for Hotels and Rooming Houses, 9 F. R. 11322.)"

The appellant pleaded not guilty to the charge and thereafter, on January 15, 1946, the cause came on regularly to trial before the Honorable William Healy, United States Circuit Judge, sitting as a District Judge. After the taking of testimony, the jury returned a verdict of guilty, and appellant was sentenced to serve sixty days in the County Jail and pay a fine of $300.00. From this judgment and sentence she has appealed to this Court. Pursuant to an order made by the trial Court under the provisions of Rule 8 of the Criminal Appeals Rules, the appeal is prosecuted upon an Assignment of Errors and the Clerk's Record of the proceedings without a bill of exceptions. (R. 8.)

SPECIFICATION OF THE ASSIGNED ERRORS RELIED UPON.

Assignment of Error No. 1. (R. 7.)

ARGUMENT.

1. SUMMARY.

The only point relied on for a reversal of the judgment is that the information failed to state facts constituting a crime and was insufficient to confer jurisdiction on the District Court for each of the following reasons:

(a) The offense sought to be charged can only be committed by one of a particular class of persons. The information fails to allege that defendant was a person belonging to that class.

(b) The information fails to charge, as a fact, what was the maximum price fixed by law (regulation) for the rental of the room.

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2. GENERAL PRINCIPLES OF LAW RELATING TO INDICTMENTS AND INFORMATIONS.

Neither the testimony or other portions of the record can be resorted to for the purpose of supplying a necessary allegation missing from the charge.

Fontana v. United States, 262 Fed. 283.

A Federal Criminal Court can only acquire jurisdiction by the filing of a sufficient charge of crime in such Court.

Albrecht v. United States, 273 U.S. 1, 8, 71 L. ed. 505, 509.

A material fact cannot be supplied by way of recital, or by inference, intendment, or implication:

"The fact must be charged and charged distinctly. We cannot by inference fill out an incomplete charge."

United States v. Morrissey, 32 Fed. 147, 151;
Danaher v. United States, 39 F. (2d) 325.

"The general rule in reference to an indictment is that all the material facts and circumstances embraced in the definition of the offense

must be stated, and that, if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication. The charge must be made directly and not inferentially or by way of recital."

United States v. Hess, 124 U.S. 486;

Pettibone v. United States, 148 U.S. 197, 202, 37 L. ed. 419, 423;

Asgill v. United States, 60 Fed. (2d) 780;

Harris v. United States, 104 F. (2d) 4.

The purpose of an indictment or information, among other things, is to inform the Court of facts from which the Court can determine whether a crime has been committed:

"The object of the indictment is, * * * second, to inform the court of the facts alleged, so it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone."

United States v. Cruikshank, 92 U.S. 542, 23 L. ed. 588, 593;

United States v. Hess, 124 U.S. 483, 487, 31 L. ed. 516, 518.

Where the law, under which an accused is prosecuted, is enacted in general terms, or generally provides that under varying circumstances different acts may constitute a violation thereof, an indictment or information is not sufficient if merely worded in the language of the law. The particulars must be stated:

"In criminal cases, prosecuted under the laws of the United States, the accused has the consti-

tutional right 'to be informed of the nature and cause of the accusation.' Amend. VI. In U.S. v. Mills, 7 Pet., 142, this was construed to mean, that the indictment must set forth the offense 'with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged;' and in U. S. v. Cook, 17 Wall. 174 (84 U.S. XXI, 539), that 'Every ingredient of which the offense is composed must be accurately and clearly alleged.' It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species; it must descend to particulars.' "

United States v. Cruikshank, supra;
Asgill v. United States, 60 F. (2d) 780, 784.

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3. THE INFORMATION WAS INSUFFICIENT TO STATE A CRIME OR TO CONFER JURISDICTION ON THE DISTRICT COURT, IN THAT IT FAILS TO ALLEGE THAT DEFENDANT WAS OF THE CLASS OF PERSONS GOVERNED BY THE REGULATION.

Assignment of Error No. 1. (R. 7.)

That the information in the above entitled cause does not state facts sufficient to charge this defendant with any crime or offense against the United States of America.

The indictment contains no allegation that the appellant was the owner, the lessee, the proprietor, or

the manager of the hotel and rooming house mentioned in the information or that she had any connection therewith at all. Obviously, there must be a relationship of landlord and tenant; the crime can only be committed by one in possession of a hotel or rooming house and engaged in the operation of the same or such person's agent. This is apparent from the Regulation parenthetically mentioned at the conclusion of the information, to-wit, "Regulations for Hotels and Rooming Houses". 9 *Fed. Regis.* 11322, sec. 13, subdivision (a), par. 9 provides:

> " 'Landlord' includes an owner, lessor, sublessor, assignee, or other person receiving or entitled to receive rent for the use or occupancy of any room or an agent of any of the foregoing."

It is not alleged in the information that the defendant was any of these things, or that she was receiving or entitled to receive, rent for the use or occupancy of the room mentioned in the information. If she was not, the Regulation had no application to her.

Where a crime can only be committed by a particular class, the indictment must show on its face that the defendant belonged to that class by direct averment, and such fact cannot be supplied by inference or intendment. Many decisions pronounce this rule, but we need not go further than *Johnson v. United States* (CCA-9), 294 Fed. 753. The indictment in that case was far better as a pleading than the information in the case at bar because it alleged, in general terms, that the defendant was a person belonging to the class involved, while here there is not

even a general averment that defendant was of the class covered by the regulation. Nevertheless, this Court held that the indictment did not charge a crime and reversed the judgment. The late Judge Rudkin, who wrote the opinion of the Court, uses the following language (at p. 755):

> "* * * Again, the averment that the plaintiff in error was a person required to register is a naked conclusion of law at best. If he did certain things, or engaged in certain activities, he was required to register as a matter of law; and, if he did none of these things, he was not. As we have already seen, the court below was of the opinion that no person can possess narcotics lawfully without registration, and it would be going a long way indeed to presume that the grand jury did not fall into the same error. The question of the sufficiency of a similar indictment was reversed by this court in Bacigalupi v. U. S. (C.C.A.) 274 Fed. 367. In Pendleton v. U. S., supra, it was held that a like indictment was defective. A contrary ruling seems to have been made without discussion in Miller v. U. S. (C. C. A.) 288 Fed. 816. **But it would seem upon principle, as well as upon authority, that where a crime can only be committed by a particular class of persons, the indictment should show upon its face that the defendant belonged to that class, by direct averment, not as a mere conclusion of law;** for example, it would not be sufficient, in an indictment for illegal voting, to charge that the defendant was not a qualified voter, without setting forth the grounds of disqualification. Quinn v. State, 35 Ind. 485, 9 Am. Rep. 754. So in a prosecution for failure to register under the Selective Service Act (Comp. St.

§§ 2044a-2044k) we apprehend it would not be sufficient to charge that the defendant was required to register. The indictment or information should go further, and show that he was one of the particular class mentioned in the statute."*

In *U. S. v. McCormick,* 28 Fed. Cases 1060, 1062, Cas. No. 15,663, it is said:

> "It has been correctly contended on the part of the traverser, where an act is by statute forbidden to be done by persons of a certain description, an indictment, grounded on such statute, must by a substantive averment, bring the traverser within that description * * *. It was necessary therefore that the indictment should state by a direct allegation that the traverser was such a minister at the time when the offense is charged to have been committed."

See also, 42 *C. J. S.,* p. 1019, and cases cited in note 91.

In the instant case the information fails to allege that defendant was of the class governed by either the statute or regulation. It may be argued, as the information charges that defendant rented the room in question, that from this the inference can be drawn that she was one of the persons named in the regulation and so connected with the hotel that she had the power of renting rooms and collecting rent therefor. However, a material fact cannot be supplied by either inference, intendment or implication. Such fact must be directly charged and alleged.

---

*All emphasis appearing in quotations from cases have been supplied by the writer.

From all that appears from the information defendant had nothing whatever to do with the operation of the hotel and therefore was not one of the persons governed by the regulation.

The information must be tested in the light of the rule that appellant is presumably innocent and has no information or knowledge of the facts charged against her. (*Fontana v. United States,* 262 Fed. 283.)

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4. THE INFORMATION FAILS TO ALLEGE AS A FACT WHAT WAS THE MAXIMUM PRICE FIXED BY LAW FOR THE RENTAL OF THE ROOM.

Assignment of Error No. 1, supra.

The information charges that defendant rented the room in question for $5.00 "which said sum of $5.00 per night for two persons was higher than the maximum price fixed by law, said maximum price then and there being $2.00 per night for two persons." (R. 2.) Here follows a parenthetical reference to the OPA regulation governing rents for hotel and rooming houses as printed in 9 Federal Register 11322.

The naked allegation that the sum was higher than the maximum price fixed by law is a mere conclusion of the pleader. Any allegation which does no more than state that an act was in violation of law or contrary to law or in excess of a limit fixed by law, is not an allegation of fact but the statement of a legal conclusion.

United States v. Minnec, 104 Fed. (2d) 575;
Middlebrooks v. United States, 23 Fed. (2d) 244;
Broadus v. United States, 30 Fed. (2d) 394;
United States v. Horton, 282 Fed. 731.

Before an information charging one with violating the maximum price regulation for the rental of rooms can be sufficient it must be alleged as a fact—not as a mere conclusion—what was the maximum price fixed by law for such rental, and this must be done by setting forth such facts as are necessary to establish such maximum price. The mere allegation that the sum of $2.00 was the maximum price is but the conclusion of the pleader.

The parenthetic reference to the Regulation For Hotels and Rooming Houses does not supply the foregoing deficiency. As stated above the purpose of the accusatory pleading is to enable the Court to determine whether or not a crime has been committed (*United States v. Cruikshank,* supra; *United States v. Hess,* supra), and in doing so the Court can take judicial knowledge of such regulations as are published in the Federal Register, but **if the regulation itself conveys no information to the Court, the Court is powerless to make such determination and in such circumstances the information is insufficient and void.**

The regulation referred to in the information contains nothing from which the Court could ascertain the maximum rental that lawfully could be charged

for room 11 in the Hotel Rosslyn. We print in the margin pertinent portions of such regulation.*

---

*SEC. 4. *Maximum rents.* This section establishes separate maximum rents for different terms of occupancy (daily, weekly or monthly) and numbers of occupants of a particular room. Maximum rents for rooms in a hotel or rooming house (unless and until changed by the Administrator as provided in section 5) shall be:

(a) *Rented or regularly offered during maximum rent period.* For a room rented or regularly offered for rent during the thirty days ending on the maximum rent date, the highest rent for each term or number of occupants for which the room was rented during that thirty-day period, or, if the room was not rented or was not rented for a particular term or number of occupants during that period, the rent for each term or number of occupants for which it was regularly offered during such period.

(b) *First rented or regularly offered after maximum rent period.* For a room neither rented nor regularly offered for rent during the thirty days ending on the maximum rent date, the highest rent for each term or number of occupants for which the room was rented during the thirty days commencing when it was first offered for rent after the maximum rent date; or, if the room was not rented or was not rented for a particular term or number of occupants during that period, the rent for each term or number of occupants for which it was regularly offered during such period.

(c) *First rent after maximum rent date where no maximum rent established under* (a) *or* (b). For a room rented for a particular term or number of occupants for which no maximum rent is established under paragraphs (a) or (b) of this section the first rent for the room after the maximum rent date for that term and the number of occupants, but not more than the maximum rent for similar rooms for the same term and number of occupants in the same hotel or rooming house.

* * * * * * *

(g) *Rent fixed by order of Administrator.* For a room for a particular term or number of occupants for which no maximum rent has been established under any other provision of this regulation, the rent fixed by order of the Administrator as provided in this paragraph (g).

The Administrator at any time on his own initiative or on petition of the landlord may enter an order fixing the maximum rent and specifying the minimum services for a room for a particular term or number of occupants for which no maximum rent has been established prior to issuance of the order under any other provision of this regulation. Such maximum rent shall be fixed on the basis of the rent generally prevailing in the Defense-Rental Area for comparable housing accommodations on the maximum rent date.

There is no allegation in the information that the room in question was rented or regularly offered for rent during the maximum rental period; there is no allegation as to the highest rent for the room during the thirty-days mentioned, or any period of time, nor is there any averment that the Administrator ever made any order fixing the maximum rent for the room; in short, no facts whatever are stated to show what was the maximum rental.

It should be alleged what the rental of the room was during the last thirty days that it was rented, or, if it had not been rented at all, what the maximum rent was for similar rooms for the same term and number of occupants in the same rooming house or, that the Administrator had, prior to the time mentioned in the information, made an order fixing the maximum rent. Because of the absence of any such averment the statement in the information that the rent alleged to have been charged was higher than the maximum price fixed by law is a naked conclusion of the pleader. The information charges no crime and the Court below had no jurisdiction to proceed thereunder.

Where a duly promulgated regulation definitely fixes a ceiling price at which an article may be sold or a room rented, an indictment may be sufficient if it alleges this ceiling price and makes proper reference to the regulation; but **where the regulation does not fix a ceiling price and merely establishes various formulas for arriving at a ceiling price, variable under different circumstances and conditions, then the in-**

formation must descend to particulars and a mere allegation of the alleged ceiling price is insufficient.

In the case of *United States v. Johnson* (D. C.—Del.), 53 F. Supp. 167, various indictments for violating the Emergency Price Control Act were held insufficient for merely charging that the sale, made at a certain price, was in violation of the maximum price (stated in the indictment) established by certain regulations relating to the sale of poultry, which regulations provided a formula for arriving at the maximum price.*

The Court held the indictments insufficient, first, upon the general ground that an inspection of the statute, indictment and regulations did not permit either the defendants or the Court to tell what was the maximum selling price. At page 170 the District Judge states:

> "Sufficient facts of a crime committed must be stated in an indictment to support a conviction. Specifically, the court and defendants must be able to determine this from the indictment, the statutes and the pertinent administrative regulations passed pursuant to the statutes. If the facts alleged may all be true and yet appear to constitute no offense, the indictment is insufficient. Fontana v. United States, 8 Cir., 262 F. 283; Lynch v. United States, 8 Cir., 10 F. (2d) 947; United States v. Armour & Co., D.C., 48 F. Supp. 801; 27 Am. Juris. p. 621. * * * **It is impossible to**

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*In the case at bar the regulation provides several formulas for arriving at different maximum prices at which the same rooms can be rented.

glean from the allegations of each indictment, the Act, and the regulations what, in fact, the ceiling price was for the commodity, notwithstanding that the prices mentioned in the indictments are the ceiling prices or are below the ceiling prices. Since the Act and the regulation do not establish any specific ceiling price for the commodity sub judice, defendants are entitled to know not only what the government claims the ceiling price to be, but also the manner in which it arrived at this conclusion."

Referring specifically to the indictments the District Judge, at page 171, states:

"It is manifest from this regulation that to determine ceiling price in a given situation, one must know (a) the buyer's 'customary receiving point'; (b) the freight charges from Chicago to the buyer's 'customary receiving point'; (c) whether the prosecution is for an alleged violation of the retail ceiling or of the wholesale ceiling; and (d) with respect to those transactions alleged to have been 'f.o.b.', the freight charges from the farm to the buyer's 'customary receiving point.' **This is because the then regulation made no specific price ceiling for the different localities which are set forth in the indictments. The indictments simply set forth a ceiling price. But, in the indictments all the administrative symbols constituting the formula are left as unknowns.**"

Concluding on this point, the Court's language is:

"In short, I cannot tell from the indictments whether a crime has been committed—even if all the facts alleged are proved at trial. This alone renders the indictments insufficient."

On reargument, the judge adhered to his ruling stating, on page 173, as follows:

> "Since no ceiling price is fixed in Regulation 269, the indictment must show how the grand jury arrived at the ceiling price for the particular defendant, for, as I said before, a defendant should be permitted to take advantage of a faulty calculation before trial and consequently he should be informed of all material elements that go to make up the crime. I accordingly refuse to alter the result of my original opinion."

The foregoing case is peculiarly applicable to the case at bar. Here the regulation purporting to fix maximum rentals merely sets forth various means for computing such maximum rentals. Thus, section 4(a) provides for the maximum price for a room rented during the thirty days ending on the maximum rental date. Section 4(b) provides a different maximum for the same room if it was not rented during the thirty day period. Section 4(c) provides for the fixing of a maximum rental when the circumstances set forth in (a) and (b) do not exist. Section 4(g) provides for fixing of such rental by an order of the Administrator. Each of the foregoing formulas, if used, result in a different maximum rental for the same room.

The mere allegation that the maximum rental was two dollars per night for two persons is but the conclusion of the pleader. Neither Court nor counsel can determine from the statute, the regulations and the information, whether two dollars per night or five dollars per night was above, below or exactly equal to

the maximum price established by law. In fact, neither the statute nor the regulations establishes any maximum rental, all they do is to provide various methods of computation, to be used under varying conditions, for establishing such rental.

CONCLUSION.

For the errors herein assigned, it is respectfully submitted that the judgment of the District Court should be reversed and the cause remanded with directions to dismiss the information and to discharge the defendant *sine die.*

Dated, San Francisco, California,
May 24, 1946.

Respectfully submitted,
LEO R. FRIEDMAN,
Attorney for Appellant.

No. 11,238

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ZEREFA MALOOF,	
	Appellant,
vs.	
UNITED STATES OF AMERICA,	
	Appellee.

APPELLANT'S PETITION FOR A REHEARING.

(Or, if a Rehearing Be Denied, For a Stay of Mandate.)

LEO R. FRIEDMAN,
Russ Building, San Francisco 4, California,
Attorney for Appellant and Petitioner.

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PAUL P. O'BRIEN,

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 11,238

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APPELLANT'S PETITION FOR A REHEARING.

(Or, if a Rehearing Be Denied, For a Stay of Mandate.)

To the Honorable Francis A. Garrecht, Senior Judge and to the Honorable Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The appellant herein petitions for a rehearing of this cause for the following reasons:

As stated in the brief opinion filed by this Court, the question presented by this appeal was whether "the information stated sufficient facts to constitute a crime and to adequately inform the appellant of what she was charged."

We respectfully submit that the information does neither of these essential things.

THE ALLEGATIONS OF THE INFORMATION, AS TO THE PRICE CHARGED AND FIXED BY LAW FOR THE ROOM, ARE BUT CONCLUSIONS OF THE PLEADER.

It is a fundamental principle of pleading, particularly in criminal prosecutions, that such words as "illegally", "unlawfully", "fraudulently", "contrary to law", etc., are mere words of vituperation, are conclusions and epithets used by the pleader only, and are not statements of fact; that an indictment or information must contain a statement of all the essential facts, and facts, not conclusions, must be averred. To allege that the thing which was done was unlawful, or contrary to law or in excess of a limit fixed by law, is a mere conclusion of the pleader; the facts supporting such conclusion must be alleged.

> *Broadus v. United States,* 30 Fed. (2d) 394;
> *Brown v. United States,* 21 Fed. (2d) 827;
> *Cooper v. United States,* 299 Fed. 483;
> *Anderson v. United States,* 294 Fed. 593;
> *United States v. Illig,* 288 Fed. 939;
> *Middlebrooks v. United States,* 23 Fed. (2d) 244.

In *Asgill v. United States,* 60 Fed. (2d) 780, the Circuit Court of Appeals, in construing Section 556 of Title 18, U. S. C. A., which provides that no indictment shall be deemed insufficient nor the trial or judgment vacated by reason of any defect or imperfection in matter of form only, which does not tend to the prejudice of the defendant, and after citing a number of decisions which have disregarded so-called "technical rules of pleading", goes on to say (at page 784),

referring to an accused's right to be informed of the nature of the charge, that

> "Neither the statute nor the decisions was or were intended to qualify or amend, nor could they qualify, amend, or set aside these provisions of the constitution."

Later, in the course of the opinion it is said:

> "The general rule in reference to an indictment is that all the material facts and circumstances embraced in the definition of the offense must be stated, and that if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication."

A person indicted for a serious offense is presumably innocent, and the sufficiency of the indictment must be tested upon the presumption that he is innocent, and has no knowledge of the facts charged against him.

Fontana v. United States, 262 Fed. 283.

None of the cases cited in the opinion of this Court uphold the validity of such a pleading as the information in the case at bar. On the contrary, they are all to the effect that the essential facts must be set forth clearly and with particularity. The first case cited is *United States v. Cruikshank,* 92 U. S. 542. In that case, after reiterating the constitutional right of the accused to be informed of the nature and cause of the accusation, the Court quotes with approval the case of *United States v. Mills,* 7 Pet. 142, and *United States v. Cook,* 17 Wall. 174, 21 L. ed. 538, to the effect that the indictment must set forth the offense "with clear-

ness and all necessary certainty, to apprise the accused of the crime with which he is charged", and that "every ingredient of which the offense is composed must be accurately and clearly alleged," and "that it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species; it must descend to particulars."

Indeed, in appellant's opening brief, we cited *United States v. Cruikshank,* as direct authority contrary to the conclusion reached by this Honorable Court.

United States v. Britton, 107 U. S. 655, also cited as authority supporting the information in the case at bar, involved an indictment based on alleged misapplication of the funds of a bank by its president. The indictment contained 119 counts, which renders it too lengthy to set forth even its substance. The Supreme Court held the first thirty-five counts good, and the rest of them bad. Concerning the first thirty-five it is said:

> "These counts embody the language of the statute; they charge every element of the offense created by the statute with sufficient certainty, and give the defendant clear notice of the charge he is called on to defend."

This states the very essentials of a good indictment, essentials which are missing from the information herein.

The only respect in which the first *Britton* case is at all in point in the case at bar is that it lays down the

correct rule for gauging the sufficiency of an indictment—the rule which appellant has urged should govern, and which has not been complied with by the government in drafting the information in the case at bar.

Dunbar v. United States, 156 U. S. 185, 39 L. ed. 390, was an indictment for smuggling opium. The point of the decision was that in charging a statutory offense, "it is unnecessary to resort to the very words of the statute. The pleader is at liberty to use any form of expression, providing only that he thereby **fully and accurately describes the offense** etc." In the case at bar, the information not only does not follow the language of the regulation which appellant is accused of violating, but contains no accurate description of the offense.

Harris v. United States, 104 Fed. (2d) 41, far from upholding the sufficiency of such a pleading as the information in the case at bar, specifically condemns it. The Court there says:

> "When an indictment contains averments necessary to constitute an offense, even though such averments are stated loosely, or without technical accuracy, it is the general rule under such circumstances that where there is a failure on the part of the defendant to attack such an indictment by demurrer or motion to quash, the omissions are cured by the verdict. However, where the challenge to the indictment is based upon an omission in the averments thereof of an essential element of the crime, objection thereto is not waived (Berry v. United States, 9 Cir., 259 Fed. 203); **it may even**

be asserted in this court for the first time. (Citing cases.)

"The statute enjoins the courts from setting aside judgments grounded upon indictments defective in matters of form only, and which shall not tend to the prejudice of the defendant (Section 556, 18 U. S. C. A.), but the essential elements of the statutory offense must be set out in the indictment. These 'are matters of substance, and not of form, and their omission is not aided or cured by the verdict.' United States v. Hess, 124 U. S. 483, 8 S. Ct. 571, 574, 31 L. Ed. 516. It is the duty of the court under such circumstances to set aside the judgment."

In the concluding paragraphs of the opinion, the Court thus declares the reason for the rule:

"The basic principle of American jurisprudence is that no man shall be deprived of life, liberty or property without due process of law. In a criminal proceeding the indictment must be free from ambiguity on its face; the language must be such that it will leave no doubt in the minds of the court or defendant of the exact offense which the latter is charged with. It should leave no question in the mind of the court that it charges the commission of a public offense."

Thus the very decisions cited in the opinion refute the conclusion reached by this Honorable Court.

THE INFORMATION DID NOT ADEQUATELY INFORM THE APPELLANT WITH WHAT SHE WAS CHARGED.

The information, which is set forth in its entirety at page 3 of appellant's opening brief, merely alleges that on a certain day, appellant rented to two persons therein named, a certain room "for a rental price of $5 per night for two persons, which said sum of $5 per night for two persons was higher than the maximum price fixed by law, said maximum price then and there being $2 per night for two persons."

The rental price of the room in question was not fixed by any law, but, if fixed at all, was fixed by some regulation adopted by the Price Administrator who derived his alleged powers to fix rents and prices by virtue of the Emergency Price Control Act. Such regulations are declared to have the force of law and their violation is punishable by the infliction of both civil and criminal penalties. Accordingly, the information, to be valid must set forth facts sufficient to constitute the violation of a regulation duly adopted by the Price Administrator in the proper exercise of the powers delegated to him by the act. This the information does not do. It does not plead any regulation or any facts which would show any violation thereof. It merely refers parenthetically to the Regulations for Hotels and Rooming Houses. The opinion states:

> "Under Sec. 11 of said rent regulation the maximum rent to be charged for any room, regularly rented in any defense rental area, must be filed in the Area Rental Office. Once the maximum rent has been so filed it cannot be changed except

> by a formal order by the Area Rent Director pursuant to Sec. 5 of the said regulation. Therefore the maximum rent of the room in question, $2.00, was determined and certain under Sec. 7 of the regulation noted and **so alleged in the information.**"

We submit that the most superficial reading of the information will demonstrate that the foregoing statement is incorrect.

The information does not allege that the room was one "regularly rented"; neither does it allege that there was ever filed in the area rental office the maximum rent to be charged, nor that the administrator ever did or did not make a formal order changing the maximum rent.

No law fixed the maximum rental of this room and **no regulation of the administrator even purports to fix such maximum.** The regulations merely provide various formulae by which a maximum rental can be fixed under varying conditions, the maximum rent differing with the use of each formula.

This Court states that the maximum rent "was determined and certain", but there is neither law nor regulation fixing such rental. Surmise and conjecture have to be indulged in to support the information. This the Court cannot do. (*Asgill v. United States*, supra.)

This Court has indulged in intendments and implications to supply the omission of allegations vital to the validity of the charge. Furthermore, **this Court**

has taken judicial knowledge of something which it has no power so to do and which actually may not have been in existence. While this Court can take judicial knowledge of the regulations promulgated by the administrator, it cannot take judicial knowledge of mere documents filed in the office of the administrator under such regulations.

THIS COURT HAS ERRED IN HOLDING THAT THERE WAS NO NECESSITY TO SET OUT IN THE INFORMATION THE FORMULAE WHEREBY THE MAXIMUM RENT OF THE ROOM WAS ORIGINALLY DETERMINED.

In the opening brief of appellant (page 11, *et seq.*), after setting forth the pertinent provisions of the Rent Regulations *in haec verba,* we stated that the information was insufficient because it contained no allegation that the room in question was rented or regularly offered for rent during the maximum rental period; "that there is no allegation as to the highest rent for the room during the thirty days mentioned, or any period of time, nor is there any averment that the Administrator ever made any order fixing the rent for the room."

In support of our argument in that behalf, we cited *United States v. Johnson,* 53 Fed. Supp. 167.

This Court, without stating any reasons, or citing any authorities, has held it unnecessary to set forth the facts showing that the maximum rental for the room was arrived at in accordance with the provisions of the regulations.

In an attempt to distinguish this case from the case of *United States v. Johnson,* 53 F. Supp. 167, this Court states that in the *Johnson* case there were involved commodities with variable maximum prices, while in the case at bar no variable quantity was involved. If we are correct in assuming that this Court approves the ruling in the *Johnson* case then its decision herein is erroneous. The regulations propounded by the administrator for fixing maximum rentals are just as variable as the regulations fixing the different prices for the commodities involved in the *Johnson* case. As the formula in the *Johnson* case had to be set forth in the accusation therein, so the formula fixing the maximum rental had to be set forth in the accusation herein.

This Court states that if more information was required appellant should have made a motion for a bill of particulars. The failure to move for a bill of particulars cannot supply deficiencies in an indictment, and a defective indictment cannot be cured by the furnishing of a bill of particulars. Such is the ruling of this very Court in the case of *Foster v. United States,* 253 Fed. 481.

CONCLUSION.

It is respectfully submitted that this Court has erred in holding the information sufficient and that a rehearing should be granted.

In the event of a denial of this petition appellant asks for a stay of the mandate of this Court to enable appellant to apply to the Supreme Court of the United States for a writ of certiorari.

Dated, San Francisco, California,
September 25, 1946.

Leo R. Friedman,
Attorney for Appellant and Petitioner.

Certificate of Counsel.

I hereby certify that I am counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
September 25, 1946.

Leo R. Friedman,
Counsel for Appellant and Petitioner.

No. 11,238

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ZEREFA MALOOF,	
	Appellant,
vs.	
UNITED STATES OF AMERICA,	
	Appellee.

APPELLANT'S SUPPLEMENTAL BRIEF.

LEO R. FRIEDMAN,
Russ Building, San Francisco 4, California,
Attorney for Appellant.

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No. 11,238

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ZEREFA MALOOF, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	

APPELLANT'S SUPPLEMENTAL BRIEF.

During oral argument Mr. Justice Bone suggested that the parties comment on the decision of this Court in *Fink v. United States,* 142 F. (2d) 443 and that appellant discuss the case of *United States v. Fried,* 149 F. (2d) 1011, referred to by attorney for appellee. The Court invited the submission of such additional authorities as may bear on the question involved. Hence, this supplemental brief.

THE CASE OF FINK v. UNITED STATES.

The opinion of this Court in the *Fink* case is brief and does not set forth the charging part of the indictment. An examination of the record of the case,

in the office of the clerk of this Court, discloses that the question involved herein was not raised, discussed or decided.

The record in the *Fink* case shows that Fink was charged by an information with violating the Emergency Price Control Act in the sale of refrigerators. Fink's assignment of errors, excluding the questions of evidence, assigned the following points (a) The information was defective as being in violation of the due process clause, (b) The information failed to state a public offense, and (c) The Act was unconstitutional. Fink's single brief—which actually contains no argument and amounts to no more than a statement of legal contentions—refers only to one point as showing the invalidity of the information, viz.: that Congress has no power to fix prices at which commodities may be sold unless such commodities are affected with a public interest and, therefore, the information was invalid as being based on a void statute. Fink advanced no argument that the information was void because the allegation as to the maximum price was but a mere conclusion of the pleader. The Government's brief is devoted entirely to a discussion of the validity of the Act and does not touch upon the point involved herein.

This Court disposed of Fink's contentions as to the invalidity of the Act by merely referring to the case of *Yakus v. United States.* Then this Court, *sua sponte,* noted the assignment that the information failed to state a public offense and decided the issue as follows:

"One of appellant's assignments of error asserts that the information 'failed to state a public offense,' meaning, we suppose, that it failed to charge an offense against the United States. There is no merit in this assignment. Each count of the information charged an offense against the United States, namely a violation of §§ 4(a) and 205(b) of the Emergency Price Control Act of 1942, 50 U.S.C.A. Appendix §§ 904(a) and 925(b)."

The questions of whether an information is sufficient that merely states the maximum price of an article as a mere conclusion of the pleader, whether an allegation is sufficient that states a price as being fixed by law, when no law fixes such price and whether, when a maximum price is arrived at by particular facts and circumstances, such facts and circumstances must be alleged by the pleader, were never raised, argued or decided in the *Fink* case.

ADDITIONAL AUTHORITIES.

In addition to the authorities cited in appellant's opening brief, on the question of the information being insufficient as stating the maximum rental as a mere conclusion of the pleader, we submit the following pertinent authorities:

First, we call the Court's attention to the rule announced by the Supreme Court in the case of *United States v. Cruikshank,* 92 U.S. 542, and *United States v. Hess,* 124 U.S. 483, 487, wherein it is stated that in order to constitute a valid indictment "facts are to

be stated, not conclusions of law alone" and that the information, where the offense is prescribed in generic terms, "must descend to particulars."

In *United States v. Ferranti* (D.C.—N.J.), 59 Fed. Supp. 1003, the Court had before it an indictment charging the sale of poultry in violation of the Maximum Price Regulations. The indictment alleged that the poultry had been sold "at the price per pound of 34¢ * * * the maximum price permitted by said regulation * * * being 31¢ per pound." The language of the decision is peculiarly applicable to the case at bar. First, the District Judge stated the general rule as announced in *Fontana v. United States,* 262 Fed. 283, as follows:

> " 'It is essential to the sufficiency of an indictment that it set forth the facts which the pleader claims constitute the alleged transgression, so distinctly as to advise the accused of the charge which he has to meet, and to give him a fair opportunity to prepare his defense, so particularly as to enable him to avail himself of a conviction or acquittal in defense of another prosecution for the same offense, **and so clearly that the court may be able to determine whether or not the facts there stated are sufficient to support a conviction.** (Citing cases.)' "

Then, in applying the rule to the indictment under consideration, the Court said:

> "Applying the principles stated in the cited cases, it is obvious that the indictment in the instant case does not fully inform the defendant of the nature and cause of the accusation made

against him. To be sure the indictment alleged the prices at which it is claimed the defendant sold the poultry in question and the maximum prices at which the same could have been sold lawfully, **but the allegations as to the maximum prices legally allowable are not allegations of facts but of conclusions, based upon undisclosed facts. The maximum price regulation alleged to have been violated does not establish in specific terms maximum prices for poultry; it only prescribes a formula by which such prices may be calculated, once the facts relied on for that purpose are determined. If every fact alleged in the indictment, excluding conclusions, should be admitted, it would not necessarily follow that the defendant is guilty of the crimes charged. What the maximum prices for poultry were on the dates alleged in the indictment will depend on proof of facts not disclosed by the indictment.''** (Emphasis supplied.)

The same reasoning applies to the case at bar. No provision of law fixes the rental of the room in question. No regulation of the administrator fixes such rent. It only prescribes a formula by which such price may be calculated once the facts relied on for that purpose are determined.

In *Johnson v. United States* (CCA-9), 294 Fed. 753, the indictment charged the defendant with unlawfully having in their possession certain narcotics ''said defendants then and there being persons required to register and pay a tax under the provisions of the act aforesaid as amended, and said defendants not then and there having registered under the provi-

sions of said act." This Court, at page 756, stated as follows:

> "Again, the averment that the plaintiff in error was a person required to register is a naked conclusion of law at best."

A further quotation from the *Johnson* case will be found on page 9 of our opening brief.

In *United States v. Potter* (CC), 56 Fed. 97, the indictment alleged that reports were made "as required by law." The Court held this allegation to be a mere conclusion of law and a defect in matter of substance.

In *United States v. El Paso etc. Co.* (D.C. Tex.), 178 Fed. 846, the indictment purported to charge the offense of transportation of livestock from a quarantined district into the state. The Court held the indictment insufficient and stated as follows:

> "The allegation that the Secretary duly and legally established quarantine states only the conclusion of a pleader as matter of law, which is not sufficient in criminal pleading."

In *Boykin v. United States* (CCA-5), 11 Fed. (2d) 484, the defendant was charged with the crime of bribery, it being alleged that the bribe was to operate upon the prohibition agent as to matters pending or to be brought before him in relation to his official duties. The Court held the indictment insufficient as follows:

> "The representatives of the government knew the acts which they would rely on to show a cor-

rupt intent. But it is impossible, as it appears to us, to ascertain from the indictment what acts would be relied on at the trial. Nothing but conclusions are stated. No facts are alleged from which it could be determined whether the proceedings pending or to be brought before the prohibition agent related or would relate to violations of the National Prohibition Act, * * *.' The trial court was wholly without information as to the facts relied on, and could not possibly have determined whether the matters complained of were such as could affect the official duties of the prohibition agent."

Early in our judicial history Chief Justice Marshall stated the reason why an accusatory pleading must state facts showing the commission of a crime in *The Schooner Hoppet v. United States,* 7 Cranch 389, 3 Law. Ed. 380. The Chief Justice's language in this regard is as follows:

> "That the court may see with judicial eyes that the fact, alleged to have been committed, is an offense against the laws, and may also discern the punishment annexed by law to the specific offense."

In speaking on the fact that the accusation refers to a law, the Chief Justice said:

> "It is not controverted that in all proceedings in courts of common law, either against the person or the thing for penalties or forfeitures, the allegation that the act charged was committed in violation of law, or of the provisions of a particular statute will not justify condemnation, unless, independent of this allegation, a case be

stated which shows that the law has been violated. The reference to the statute may direct the attention of the court, and of the accused, to the particular statute by which the prosecution is to be sustained, but forms no part of the description of the offense. The importance of this principle to a fair administration of justice, to that certainty introduced and demanded by the free genius of our institutions in all prosecutions for offenses against the laws, is too apparent to require elucidation, and the principle itself is too familiar not to suggest itself to every gentleman of the profession."

In the case at bar how can the Court ascertain from the information whether a crime has or has not been committed? The allegation that two dollars was the maximum rental price fixed by law is but the conclusion of the pleader. No law or regulation fixed such price. The price was a matter of fact and had to be pleaded and proved as a fact.

THE INFORMATION FAILS TO ALLEGE THAT ACCUSED WAS A PERSON REGULATED BY THE ACT.

At oral argument a member of the Court suggested that the allegation in the information that appellant did "rent * * * a certain room" was sufficient to justify the conclusion that she was a person who had charge of such room to the extent of being able lawfully to rent it. This is supplying a necessary element of the information by inference and intendment. No

essential element of a charge can be supplied by inference or intendment.

In cases where diversity of citizenship or alienage was necessary to confer jurisdiction upon one of our Courts, the Supreme Court has repeatedly held that such allegations must be made directly and positively and the absence of such direct and positive allegations could not be supplied by inference, intendment or construction.

In *Bors v. Preston,* 111 U.S. 252, 28 L. ed. 419, the action was one brought by plaintiff as a citizen of New York against the defendant, alleged to be consul at the port of New York for the Kingdom of Norway and Sweden. The Court held such allegation insufficient as an averment of alienage.

In the case of *Stuart v. City of Easton,* 156 U.S. 46, 39 L. Ed. 341, the opinion reads:

> "The Chief Justice: Plaintiff in error is described throughout the record as 'a citizen of London, England,' and the defendants as 'corporations of the state of Pennsylvania.' As the jurisdiction of the circuit court confessedly depended on the alienage of plaintiff in error, and that fact was not made affirmatively to appear, the judgment must be reversed * * *."

In the case of *Horne v. Hammond Co.,* 155 U.S. 393, 39 L. Ed. 197, the averment held insufficient to show citizenship was that the woman was "the widow of the late Granville P. Horne, of Chelsea, Suffolk County, Commonwealth of Massachusetts, and that

she was duly appointed by the Probate Court of Suffolk County administratrix of his estate."

See also the cases of:

> *Anderson v. Watt,* 138 U.S. 694, 34 L. Ed. 1078;
> *Brown v. Keene,* 8 Pet. 112, 8 L. Ed. 885;
> *Mansfield v. Swan,* 111 U.S. 379, 28 L. Ed. 462;

as other illustrations of insufficient allegations of this character. Of course the last six cited cases were civil actions and the Court was justified in examining the record in order to determine if the lower Court acquired jurisdiction. In the case at bar the record cannot be examined for such purpose, but only the information.

THE CASE OF UNITED STATES v. FRIED, RELIED ON BY THE GOVERNMENT.

Mr. Henderson, arguing for the Government, mentioned the case of *United States v. Fried,* 149 F. (2d) 1011, as disapproving the case of *United States v. Johnson,* 53 F. Supp. 167, relied on by appellant.

The *Fried* case was decided in the Second Circuit and under rules of law and procedure peculiar to that circuit.

The information in the *Fried* case charged a violation of the Act and is summarized by the Court as follows:

> "Each count alleged the date of the sale, the buyer, the kind of liquor (including the brand),

> the amount and the price; and concluded as follows: 'which sum constituted a price per case permitted to be charged by said defendant for such merchandise under Maximum Price Regulations Nos. 193 and 445 as promulgated by the Price Administrator'."

No challenge to the form or sufficiency of the information was made until the case was on appeal.

The Court admitted that the information set forth only legal conclusions and then, pursuant to its own decisions and contrary to the law of other circuits and as announced by the Supreme Court, held that such was a defect in matter of form and not of substance. The Court's language is as follows:

> "Strictly, we need say no more as to the information than that the objection was raised too late; for no essential allegation was omitted, and the defect, if any, was only of insufficiency in form: i.e., **that instead of facts the information alleged only legal conclusions.**" (Emphasis supplied.)

The allegation of a material fact in a pleading merely as a legal conclusion is defect in a matter of substance. (See cases cited in Appellant's Opening Brief and under the heading herein of "Additional Authorities".)

Then the Court proceeded to discuss the matter and, under rules pertaining to the Second Circuit, held the allegations sufficient:

> "We regard the defect as falling within § 556 of Title 18 U.S.C.A., and of no importance unless the accused can show that the information as a whole does not advise him adequately of what he

> has to meet. Not only in civil, but in criminal, proceedings we demand nothing more than that a party charged shall be told the facts fully enough, and in sufficient season, to enable him to prepare his defense. Inconsistencies between allegation and proof, and inadequacies in allegation, are unimportant unless they result in such prejudice. Our latest decisions upon the point are (here the court cites three decisions from its own, the second, circuit). In so far as the decisions in United States v. Johnson, D.C., 53 F.Supp. 167 and United States v. Ferranti, D.C. N.J., 59 F. Supp. 1003, are to the contrary, they do not represent the law of this circuit."

The Court was in error in holding that the defect was one of form only and therefore cured by Sec. 556 aforesaid. The failure to allege a material and essential fact, or alleging such merely as a conclusion, is a defect in matter of substance.

> "Section 1025, Revised Statutes (18 USCA § 556), has reference to form only, and cannot be invoked to cure the omission of an essential element of the offense sought to be charged."
>
> *Wishart v. United States* (CCA-8), 29 Fed. (2d) 103, 107;
>
> *Asgill v. United States,* 60 Fed. (2d) 780.

The Court entirely overlooked the fact that the jurisdiction of the Court depended upon the filing of a valid accusatory pleading—one that stated the facts constituting the offense.

A Criminal Court can only acquire jurisdiction by the filing of a sufficient charge of crime in such Court:

Ex parte Bain, 121 U.S. 1, 30 L. ed. 849;
United States v. London, 176 Fed. 976, 979;
Post v. United States, 161 U.S. 583, 40 L. ed. 505.

"A person may not be punished for a crime without a formal and sufficient accusation even if he voluntarily submits to the jurisdiction of the court."

Albrecht v. United States, 272 U.S. 1, 71 L. ed. 505.

It is interesting to note that the Court, in discussing the evidence, held that the testimony of witnesses as to their conclusion of what the regulations provided was insufficient to support a conviction. It is impossible to reconcile these two propositions. **If the evidence consisting of a conclusion was insufficient to establish the material fact, then the allegation of a conclusion in the pleading was insufficient as an allegation of such fact.**

Thus, it will be seen, the *Fried* case merely announces rules applicable only to the second circuit, rules which are at variance with those of all other circuits and contrary to the law as announced by the Supreme Court.

Dated, San Francisco, California,
December 16, 1946.

Respectfully submitted,
Leo R. Friedman,
Attorney for Appellant.

No. 11,238

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ZEREFA MALOOF,	
	Appellant,
vs.	
UNITED STATES OF AMERICA,	
	Appellee.

APPELLANT'S PETITION FOR A REHEARING.

(Or, If a Rehearing Be Denied, For a Stay of Mandate.)

LEO R. FRIEDMAN,
935 Russ Building, San Francisco 4, California,
Attorney for Appellant
and Petitioner.

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To the Honorable Judges of the United States Circuit Court of Appeals of the Ninth Circuit:

Appellant respectfully petitions for a rehearing of this cause after reaffirmance of the original opinion on the ground that the decisions cited in the opinion of this Honorable Court on rehearing do not sustain the conclusion that the information recited sufficient facts to properly charge a crime against the United States and to adequately inform petitioner of what she was charged.

The main distinction between the cases relied on by this Court, with few exceptions, and the case at bar is as follows: An information couched in language

such as the one under discussion is sufficient where there is a law or regulation specifically fixing the ceiling price and of which the Court can take judicial notice; but where there is no such law or regulation then the information must descend to particulars and set forth the facts which fix and determine the ceiling price.

In *Morgan v. United States*, 149 Fed. (2d) 185, the commodity involved was ice, for which the maximum price was fixed by regulation of which the Court could take judicial notice.

In the case at bar the general regulations for hotels and rooming houses provide several formulae for arriving at different maximum prices at which the same rooms can be rented. **The regulation made no specific price ceiling,** and in the information all the administrative symbols constituting the formulae are unknown quantities. There is nothing in the information to show how the pleader arrived at the ceiling price for this particular defendant. No court reading such an information could determine whether a crime has been committed.

See

United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588, 593;

United States v. Hess, 124 U. S. 483, 31 L. ed. 516;

Asgill v. United States, 60 Fed. (2d) 780, 784.

In *Fink v. United States*, 142 Fed. (2d) 443, decided by this Court, the information is not set forth,

nor is its sufficiency discussed. We fully discussed and distinguished this case in our Supplemental Brief.

The foregoing observations are likewise applicable to *United States v. Steiner,* 152 Fed. (2d) 484. The allegations of the various counts in the indictment are not quoted in the opinion, but the Court says:

> "The indictments clearly advise the defendants of the date of the sale, the person to whom sold, the place where the sale took place, the amount for which each implement was sold and the maximum or ceiling price for such implement under the above law and regulation."

It also appears that the sale involved was of agricultural instruments which were described in the indictment. **The price of these instruments was fixed by a certain maximum price regulation of which the Court could take judicial notice.**

As pointed out in appellant's Supplemental Brief, pages 10-12, *United States v. Fried,* 149 Fed. (2d) 1011, is wholly inapplicable. The information in that case was indisputably bad, and **was admitted by the Circuit Court of Appeals for the Second Circuit to be bad,** because it stated nothing but conclusions. The judgment of conviction was affirmed because of the peculiar rules of law and procedure prevailing on that Circuit, and the opinion admits that it is contrary to the decisions on other circuits.

United States v. Pepper Bros., 142 Fed. (2d) 340, is not at all in point. The chief question involved in

that case was whether a regulation adopted under the Emergency Price Control Act, fixing the price of Poultry in accordance with standards, was repealed by the Taft Amendment providing that the Act should not be construed as authorizing standardization or price regulation by classes or types, except under certain conditions. The District Court held the information insufficient, but the Circuit Court of Appeals reversed the ruling, proceeding apparently on the ground that the defendant had the right to attack the validity of the regulation, but that the District Court must accept the regulation as valid, unless and until it was set aside by the Emergency Court of Appeals or by the Supreme Court of the United States. The ruling of the Circuit Court of Appeals is obviously based upon a misconstruction of the opinion of the Supreme Court of the United States in *Yakus v. United States,* 321 U. S. 414, 64 S. Ct. 660.

Flannagan v. United States, 145 Fed. (2d) 740, involved a sale of beef for a sum in excess of the maximum fixed by the regulation. **The regulation specifically fixed the price per pound for a certain grade of beef,** and the information alleged that the beef sold was of that grade and of a certain designated weight. The name of the person to whom the beef was sold was given and the maximum price regulation was referred to. Accordingly, the information was in all probability sufficiently specific.

Lastly, it is submitted that without a valid information from which the Court can determine whether a crime has been committed and which sufficiently in-

forms the defendant of the nature and cause of the accusation against him, the Court has no jurisdiction to proceed to trial, and no failure to demur or to object to the sufficiency of the indictment can cure the defect, because the rule is elementary that jurisdiction cannot be conferred by inaction, waiver, or even by express stipulation. The failure of the indictment or information to charge a crime may be raised for the first time on appeal.

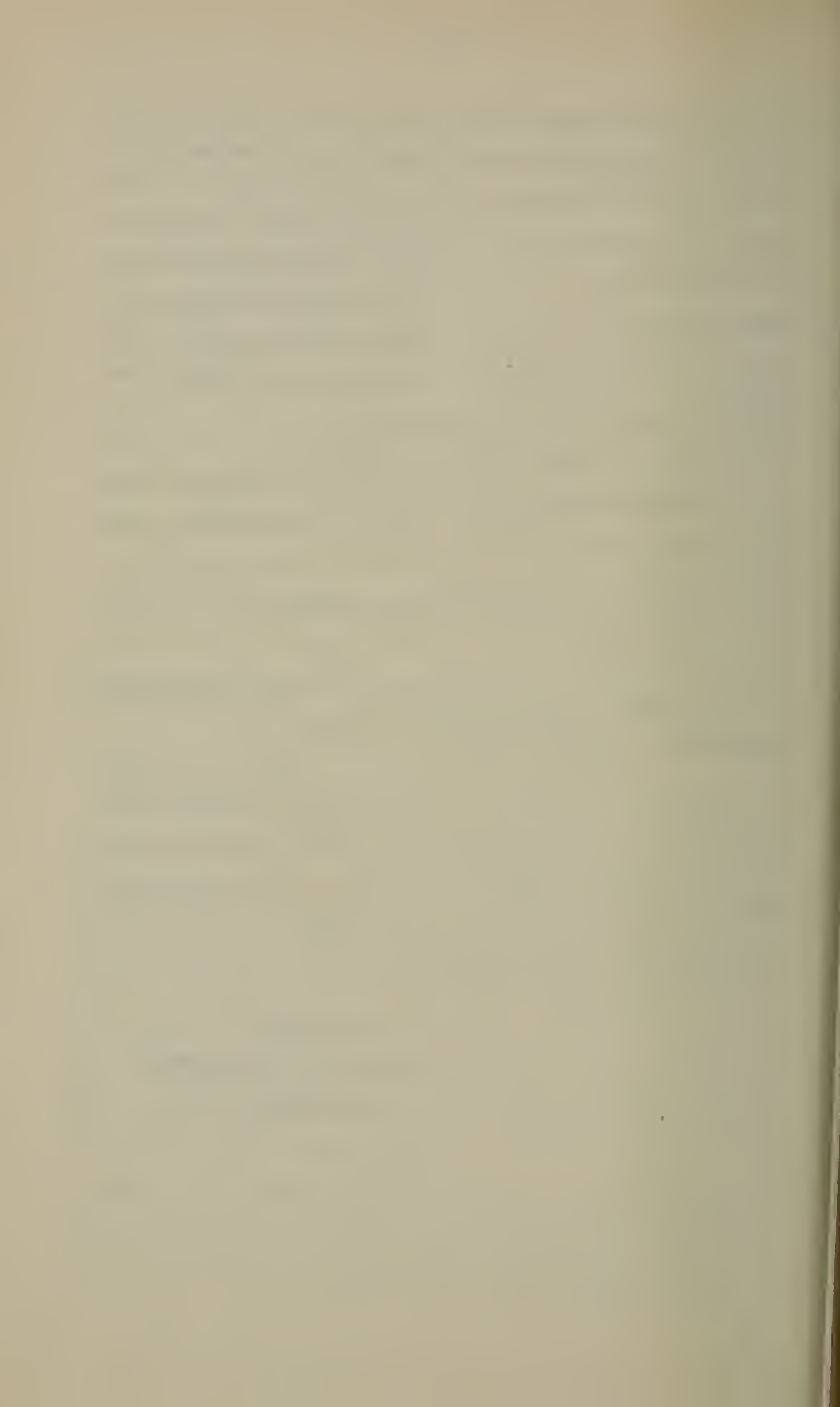
Asgill v. United States, supra;
Ex parte Bain, 121 U. S. 1, 30 L. ed. 849;
Post v. United States, 161 U. S. 583, 40 L. ed. 505;
Albrecht v. United States, 272 U. S. 1, 71 L. ed. 505.

It is respectfully submitted that a rehearing should be granted and the judgment reversed.

In the event of a denial of this petititon, appellant respectfully prays for a stay of the mandate of this Court to enable appellant to apply to the Supreme Court of the United States for a writ of certiorari.

Dated, San Francisco, California,
February 17, 1947.

Leo R. Friedman,
Attorney for Appellant and Petitioner.



Certificate of Counsel.

I hereby certify that I am counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
February 17, 1947.

Leo R. Friedman,
Counsel for Appellant and Petitioner.